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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-60

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,
Appellants,

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

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Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

This appeal involves the question whether Washington's Indian jurisdiction is unconstitutional, and in violation of Public Law 83-280 since the state failed to amend its constitution as required by law. Therefore, this appeal is the logical counterpart to *State of Washington, et al. v. Confederate Bands and Tribes of the Yakima Indian Nation* (Yakima 2), 552 F.2d 1332 (9th Cir. 1977), in which the Supreme Court noted probable jurisdiction on Feb-

ruary 27, 1978, 46 U.S.L.W. 3541, No. 77-388, October Term, 1977. But whereas *Yakima 2* involves the constitutionality of Washington's *partial* jurisdiction on all state Indian reservations, this appeal involves the constitutionality of Washington's *total* jurisdiction on only *selected* state Indian reservations.

Appellants urge that for the Supreme Court to dispose fully and satisfactorily of the substantial questions of constitutionality of Washington's assumption of Indian jurisdiction, it is necessary that the Supreme Court note probable jurisdiction in this appeal and consolidate it and *Yakima 2* for argument.

OPINION BELOW

The opinion of the three-judge district court below is reported at 446 F.Supp. 1339 (9th Cir. 1978). The judgment comprises a Consolidated Decision[1] (opinion), filed February 22, 1978, and a Declaratory Judgment and Decree of Permanent Restraint[2], filed May 10, 1978. Both are reprinted in the Appendix.

JURISDICTION

On May 17, 1973, appellants Colville Confederated Tribes filed a complaint in the District Court of the Eastern District of Washington seeking the convening of a three-judge district court pursuant to 28 U.S.C. §§2281 and 2284, and seeking a declaratory judgment that Washington's Indian jurisdiction, assumed pursuant to RCW Ch. 37.12, is invalid and repugnant to art. I, §8, cl. 2 of the Constitution (the Indian Commerce Clause), the Equal Protection

1. App. A, A-1.
2. App. B, A-61.

Clause of the Fourteenth Amendment, 25 Stat. 676, §4 (the Washington Enabling Act), Wash. Const. art. 26, Second Section, and Public Law 83-280 (67 Stat. 588; 18 U.S.C. §1162, 28 U.S.C. §1360). In their action, appellants also sought an injunction restraining enforcement of Washington's Indian jurisdiction provided for in RCW Ch. 37.12.[3]

Not involved in this appeal is the relief obtained by appellants regarding the application of state excise taxes and personal property taxes on the Reservation.

This action was consolidated for purposes of trial with a companion case brought by the United States against the State on behalf of the Yakima Indian Tribe, also reported at 446 F.Supp. 1339 (9th Cir. 1978). Both cases were tried before the three-judge district court in Seattle, Washington, on March 28, 1977.

On February 22, 1978, the three-judge district court entered its Consolidated Decision.

On May 10, 1978, the three-judge district court entered the Declaratory Judgment and Decree of Permanent Restraint.

On May 16, 1978, the State filed a Motion for Partial New Trial pursuant to FRCP 59(a), *limited* to the issue of Washington's ability to tax cigarette sales by appellants on their three reservations pursuant to tribal tobacco ordinances. While FRAP 4(a) (4) provides that a Motion for New Trial under FRCP 59 tolls the running of the time for filing a notice of appeal, and has been held to destroy finality of the judgment, the Federal Rules of Appellate

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3. Pre-trial Order, ¶1.4.1,

Procedure do not affect a direct appeal to the Supreme Court from a three-judge district court and thus appellants are required to file this Jurisdictional Statement by July 10, 1978.

Jurisdiction of the Supreme Court to review the judgment below by direct appeal is confirmed by 28 U.S.C. §1253. The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963); *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73 (1960); *Hagans v. Lavine*, 415 U.S. 528 (1974); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); *Sterling v. Constantin*, 287 U.S. 378 (1932); *California Water Service Co. v. Redding*, 304 U.S. 252 (1938); *Public Service Commission v. Brashear Freight Lines*, 312 U.S. 621 (1941); *Zemel v. Rusk*, 381 U.S. 1 (1965); *Paul v. United States*, 371 U.S. 245 (1963); *Flast v. Cohen*, 392 U.S. 83 (1968).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Const. art. I, §8, cl. 2 (Indian Commerce Clause).[4]

U.S. Const. 14th Amendment (Equal Protection Clause).[5]

25 Stat. 676, §4 (Washington Enabling Act).[6]

Wash. Const. art. 26, Second Section.[7]

25 U.S.C. §§1321-26 (Civil Rights Act of 1968).[8]

Public Law 83-280 (67 Stat. 588; 18 U.S.C. §1162, 28

4. App. C, A-65.
5. App. C, A-65.
6. App. D, A-66.
7. App. E, A-67.
8. App. F, A-68.

U.S.C. §1360) (authorizing states to assume certain jurisdiction over Indian country).[9]

Executive Order of July 2, 1872, 1 Kapp. 916 (establishing the Colville Indian Reservation).[10]

RCW 37.12.010, 37.12.021 (assuming Indian jurisdiction).[10A]

QUESTIONS PRESENTED

The basic questions presented are the following:

1. Does Washington's assumption of Indian jurisdiction without constitutional amendment violate the express requirements of Public Law 83-280?

2. Does Washington's assumption of Indian jurisdiction without constitutional amendment violate the express requirements of the Washington Enabling Act?

3. Does Washington's assumption of Indian jurisdiction without constitutional amendment violate the express requirements of Wash. Const. art. 26, Second Section?

4. Does Washington's assumption of jurisdiction over the Colville Indian Reservation violate the Equal Protection Clause of the Fourteenth Amendment and art. I, §8, cl. 2, of the Constitution?

STATEMENT OF THE CASE

A. Washington's Statutory Scheme

The original bill which contemplated granting states Indian jurisdiction, was introduced by Congressman Norris Poulson in 1953 and was originally drafted for Cali-

9. App. G, A-72.
10. App. H, A-76.
10A. App. I, A-77.

fornia alone. In the midst of termination bills and other Indian legislation considered by the 83rd Congress, however, the bill was quickly recast as a prototype bill, H.R. 1063, designed to allow all states to assume Indian jurisdiction upon compliance with its provisions, and was enacted into law as Public Law 83-280.

Public Law 83-280 granted five named states, California, Minnesota, Nevada, Oregon and Wisconsin, outright total civil and criminal jurisdiction over Indians and Indian country, with the exceptions only of the Red Lake Reservation in Minnesota, the Warm Springs Reservation in Oregon, and the Menominee Reservation in Wisconsin. Those three tribes, together with the Yakima and Colville Tribes of Washington, voiced strenuous objections to H.R. 1063.

Sections 6 and 7 of Public Law 83-280 provided for similar assumption of Indian jurisdiction by the remaining 21 states with substantial Indian populations. Section 6 provided that the eight states with constitutional disclaimers of Indian jurisdiction (including Washington) could assume jurisdiction upon removal of the disclaimers by constitutional amendment. Section 7 authorized any other state to assume Indian jurisdiction by affirmative legislative action.

During the very next session of the Washington Legislature, in 1955, a bill was introduced to amend art. 26 of the state constitution to remove the constitutional disclaimer of Indian jurisdiction. The bill failed to clear committee and thus the proposed constitutional amendment failed.[11]

Nevertheless, in 1957, Washington adopted Laws of

11. 1955 Washington State Senate Journal, pp. 153, 184, 1082.

Washington, 1957, Ch. 240, which authorized the governor to issue a proclamation assuming *total* jurisdiction over any state Indian reservation at the request of the tribe. Thereafter in 1963, the Legislature adopted Laws of Washington, 1963, Ch. 36, assuming *partial* jurisdiction over all state Indian reservations without regard for the wishes of the tribes. The two provisions were codified as RCW 37.-12.021 and 37.12.010, respectively.

Under the 1963 Act, for a non-consenting tribe, the State assumed total jurisdiction with regard to fee land, but with regard to trust land only *partial* jurisdiction, limited to eight subject matter categories: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles upon the public streets, alleys, roads and highways.

Thereafter, on January 14, 1965, the Colville Business Council enacted Resolution 1965-5 requesting state assumption of *total* jurisdiction inside the Colville Reservation. Governor Evans issued a proclamation assuming *total* civil and criminal jurisdiction over the Colville Indian Reservation on January 29, 1965. Thus, on January 29, 1965, Washington had purportedly assumed *total* Indian jurisdiction over the Colville Reservation and *partial* Indian jurisdiction over the Makah and Lummi Reservations.

B. Action of the Three-Judge District Court

The three-judge district court began by holding that the decision of the Ninth Circuit Court of Appeals in *Yakima 2* striking down RCW 37.12.010 (the partial jurisdiction statute) as violating the Fourteenth Amendment, forecloses the State's contention that appellants' similar

claim is insubstantial and not a proper claim to be considered by a three-judge district court. *Goosby v. Osser*, 409 U.S. 512, 518 (1973).[12]

The three-judge district court next considered appellants' attacks on RCW 37.12.020 (the total jurisdiction statute) as violating the Equal Protection Clause, Public Law 83-280, the Washington Enabling Act and the Washington Constitution. The district court disposed of appellants' claim as follows: (1) The court held that RCW 37.12.021 (the total jurisdiction statute) does not violate the Equal Protection Clause of the Fourteenth Amendment;[13] (2) the court held that by virtue of *Yakima 2*, RCW 37.12.010 (the partial jurisdiction statute) is unconstitutional as violating the Equal Protection Clause of the Fourteenth Amendment;[14] (3) the court held that failure of the State to remove the disclaimer in its Constitution by amendment did not violate the express terms of consent of Congress in Public Law 83-280, and finally the court held that it was bound by dismissal of the appeal by the Supreme Court in *Makah v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970).

The court noted that a three-judge district court when properly convened has the power to dispose of a case on any ground presented to it, *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1963); *United States v. Georgia Public Service Commission*, 371 U.S. 285 (1963), and that to do so furthers the well-established principle of deciding constitutional issues only if necessary. *Hagans*

12. App. A, A-10.
13. App. A, A-41.
14. App. A, A-40.

v. Lavine, 415 U.S. 528 (1974); *Rosado v. Wyman,* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968); and *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288 (1936).

The three-judge district court filed its Consolidated Decision February 22, 1978, and entered its Declaratory Judgment and Decree of Permanent Restraint on May 10, 1978.

In paragraph 6 of the Declaratory Judgment, the district court declared that Washington's exercise of partial Indian jurisdiction on the Makah and Lummi reservations under RCW Ch. 37.12 is unlawful as a denial of equal protection under the Fourteenth Amendment, but that Washington's exercise of total jurisdiction over the Colville Reservation is not. While the district court failed to include a holding regarding appellants' statutory attacks on Washington's Indian jurisdiction, it did provide that its Consolidated Decision

> shall constitute the findings of fact and conclusions of law of this three-judge District Court as provided by Fed. R. Civ. P. 52(a).[15]

Thus the judgment, comprising the Consolidated Decision and the Declaratory Judgment and Decree of Permanent Restraint, adjudicates the entire subject matter in litigation, *Arnold v. United States,* 263 U.S. 427 (1923), and is clearly appealable. *The Pesaro,* 255 U.S. 216 (1921).

The Motion For Partial New Trial filed by the State is *limited* to the tax issue and thus leaves the appealability of the jurisdiction issue intact; further, the jurisdiction and cigarette tax issues in this action are altogether separable, especially since the State stipulated in the three-judge

15. App. A, A-43.

district court that it would make no effort to use Public Law 83-280 Indian jurisdiction to enforce its tax statutes.[16]

Finally, the policy of conserving judicial energy is served by consolidation of this appeal with *Yakima 2* to insure that the constitutionality of Washington's Indian jurisdiction—essentially a single question—be considered at one time rather than piecemeal.

C. Applicable Facts

The Colville Confederated Tribes are sovereign Indian tribes recognized by the United States and governed by a business council under a constitution and by-laws approved by the Secretary of the Interior on December 26, 1938. The Tribes consist of approximately 5,837 members and the Colville Indian Reservation encompasses 1.3 million acres.

The Makah Tribe is a sovereign Indian tribe recognized by the United States and governed by a tribal council under a constitution and by-laws approved by the Secretary of the Interior on May 16, 1936. The Tribe consists of approximately 1,000 members and the Makah Indian Reservation encompasses 28,000 acres.

The Lummi Indian Tribe is a sovereign Indian tribe recognized by the United States and governed by a business

16. MR. PIRTLE: . . . .

I would then like to ask, in keeping with that good faith statement, that counsel for the State stipulate before this court that the State will not rely on any jurisdiction assumed under Public Law 280 in regard to any of these taxes, that is, with respect to collecting the taxes, imposing any criminal penalties concerning the taxes or attempting to seize any property or goods of the tribes or their individual licensed operators, and I would like to ask for that stipulation. Do you so stipulate, counsel?

MR. MALONE: Surely.

Transcript of Trial, p. 71, 11.1-19.

council under a constitution and by-laws approved by the Secretary of the Interior on April 10, 1970. The Tribe consists of approximately 2,000 members and the Lummi Indian Reservation encompasses 7,319 acres.

All three reservations are located within the geographical area of the State of Washington. Each of the three reservations is isolated and undeveloped. Each tribal constitution provides the business or tribal council with authority to establish a law and order system and each reservation has a functioning police department and a tribal court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

At the outset it should be noted that

> If the three-judge court (and, on appeal, the Supreme Court) has jurisdiction by reason of the presence of a substantial constitutional question, its jurisdiction "extends to every question of law involved, whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." *Sterling v. Constantin*, 287 U.S. 378, 393-394, and cases cited; *California Water Service Company v. Redding*, 304 U.S. 252, 255-256; *Public Service Commission v. Brashear Lines*, 312 U.S. 621, 625; *Zemel v. Rusk*, 381 U.S. 1, 5-6; *United States v. Georgia Public Service Commission*, 371 U.S. 285, 287-288; *Paul v. United States*, 371 U.S. 245, 250.[17]

1. The Terms of Consent by Congress to State Assumption of Indian Jurisdiction Require Amendment of the Washington Constitution

In 1953 the termination-minded 83rd Congress considered bills in five distinct areas of Indian legislation.[18] One

17. Stern & Gressman, *Supreme Court Practice*, (4th Ed. 1969), p. 55.

18. Senate Report 699, U.S. Code Cong. & Ad. News, 1953, 83rd Cong. at 240.

bill, enacted as Public Law 83-280, was narrowly tailored to provide a state forum for criminal and civil litigation arising on Indian reservations. But in its attempt to broaden the original bill to allow all states to assume Indian jurisdiction, Congress encountered a double constitutional legal snarl.

First, until Indian title to Indian country was extinguished, (1) Indian country remained completely separate and apart from states and state laws could not be applied *extraterritorially* inside the reservations, and (2) attempts to assert state jurisdiction over Indian country invaded the exclusive power of the United States to regulate Indian commerce. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 403 (1832), *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L. Ed. 708 (1866), and *The New York Indians*, 72 U.S. (5 Wall.) 761, 18 L. Ed. 708 (1866).

In 1888 these doctrines of "extraterritoriality" and "federal preemption" were incorporated in §4 of the Enabling Act which prescribed state constitutional Compacts, "irrevocable without the consent of the United States and the *people* of said States," disclaiming Indian jurisdiction *until* the extinguishment of Indian title by the United States. The General Allotment Act of the previous year, 1887, was specifically designed to effect extinguishment of Indian title. *Draper v. United States*, 164 U.S. 240 (1896).

But with the dismantling of the allotment system by the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, Congress discontinued extinguishment of Indian title, and so in 1953 Congress had to provide for state assumption of Indian jurisdiction *without* prior extinguishment of Indian title.

The second legal difficulty confronting Congress in 1953 was that the compact of §4 of the Enabling Act was, by the terms of the Act, incorporated into the constitutions of Washington, Montana, the Dakotas, and Arizona, with similar ones incorporated into the constitutions of New Mexico, Oklahoma, and Utah. Thus, the constitutions of those eight states required amendment.

To solve both problems at once, Congress carefully tailored Public Law 83-280 so that the United States gave an *altered* consent to state assumption of Indian jurisdiction, devising a *conditional* amendment of the Enabling Acts to remove the requirement of extinguishment of Indian title and allow the necessary amendment of the state constitutions.

The precise thinking of Congress as to the meaning of Public Law 83-280 is embodied in two previously unpublished reports of hearings on H.R. 1063 which have been obtained from the National Archives and filed with the Clerk of the Supreme Court.[19]

Regarding §6 and §7, Mr. Abbott, counsel to the Committee, explained the constitutional disclaimer problem and his suggested solution:

> In short the legislation as acted upon by the committee would apply to only five states. The two additional section amendments would apply *first to the eight states having constitutional or organic law impediments* and would grant consent of the United States for them to remove such impediments and thus acquire jurisdiction.

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19. Hearing on H.R. 1063 before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, House of Representatives, 83rd Cong., 1st Sess. (June 29, 1953); Hearing on H.R. 1063 before the Committee on Interior and Insular Affairs, House of Representatives, 83rd Cong., 1st Sess. (July 15, 1953).

> The other amendment would apply to any other Indian state, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction.

Committee Hearing on H.R. 1063, p. 4, l. 5-14 (emphasis added).

The two amendments, addressing differing legal problems in two distinct sets of states, have sharply contrasting language which must be carefully studied.

> Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Public Law 83-280, 67 Stat. 588 at 590.

Mr. Abbott's bald statement that §6 and not §7 governs Washington, makes Congress' intent very clear. But the matter does not end there.

Congress' intent in Public Law 83-280 is detailed (1) by the sponsors of the Act, (2) in congressional hearings, (3) in Senate and House Reports, and (4) in Senate floor debate. *All agreed unanimously that §6 and not §7 gov-*

erned Washington. Nothing further could possibly be asked of Congress.

A. *Conditional Amendment of the Enabling Act*

Section 6 of Public Law 83-280 begins: "Notwithstanding the provisions of any Enabling Act for the admission of a State . . ." and then grants federal consent to amendment of the state constitution. The addition of the initial amendatory language is explained by colloquy in the Committee Hearing on H.R. 1063:

> Mr. Berry: Mr. Chairman, I would like to ask a question. Would it not be better to word that to say that this "shall be applicable," instead of saying "consent is hereby granted." Why not say "The provisions of the law shall be applicable" to these states wherein they do these things.
>
> Mr. Westland: I believe the law would then be applicable to them, once they had taken this affirmative action.
>
> Mr. Rhodes: Will the gentleman yield. *You cannot very well allow enabling legislation to be amended merely by giving consent. There has to be specific legislation.*
>
> Mr. Dawson: That brings up another question: Whether your wording should refer to the Enabling Act. You say "We hereby give our consent for them to amend their state constitution." Their state constitution was based upon the Enabling Act. In other words, they followed that. I wonder whether we should have something in there to say "Notwithstanding any restrictions in the Enabling Act, consent is hereby given to amend their state constitution."
>
> Mr. Abbott: (Counsel) I believe that clause "notwithstanding any provisions of the Enabling Act" for such state might well be included. *It would make clear that Congress was repealing the Enabling Act.*

> Mr. Dawson: *To give permission to amend their constitution.*
>
> Mr. Abbott: (Counsel) I think that would help clarify the *intent* of the committee at the present time and of Congress if they favorably acted on the legislation.

Committee Hearing on H.R. 1063, p. 8, l. 20 to p. 9 l. 22 (emphasis added)

In enacting Public Law 83-280, then, Congress' intent to amend the Enabling Act for the limited purpose of allowing constitutional amendment became law. But it must be firmly kept in mind that amendment of the Enabling Act was only conditional and only became operative by virtue of state constitutional amendment. The proviso of §6 underscores this conclusion ". . . *Provided,* That the provisions of *this Act* shall not become effective . . . until . . ." 67 Stat. 588 at 590 (emphasis added).

B. *Consent to Amendment of State Constitution*

After the initial amendatory language, §6 of Public Law 83-280 continues:

> . . . the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act . . .

67 Stat. 588 at 590.

Thus, federal consent to state assumption of Indian jurisdiction is *conditioned* upon amendment of the state constitution. Mr. Abbott, counsel to the Committee, stated it outright:

> Mr. Abbott: (Counsel) The intention was to grant it to all states at such time as they were willing to

> take it. The five states we have named have been consulted with by the Indian Bureau. *At any other time in the future that the state of Washington or South Dakota is able to remove their constitutional impediments, then they could so do it . . .*

Committee Hearing on H.R. 1063, p. 7, 17-22 (emphasis added).

Then the Committee began consideration of §7 which provides Indian jurisdiction for any of the other 18 states with Indian populations . . . "at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof." 67 Stat. 588 at 590.

The contrast between the language of §6 authorizing "the people of any State to amend . . . their State constitution" and that of §7 providing that "the people of the State shall, *by affirmative legislative action*" points up quite forcefully Congress' plain intent that the triggering event in §6 be a normal constitutional amendment and the triggering event in §7 be a statute enacted by the legislature. The point was driven home once and for all in the Subcommittee Hearing at which Harry A. Sellery, Chief Counsel for the Bureau of Indian Affairs, and William R. Benge, Chief of the Branch of Law and Order of the Bureau of Indian Affairs, presented the final version of the Act, and discussed the necessity of constitutional amendment for states such as Washington:

> Mr. Benge: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. *The Organic Act which admitted the state to the union and the state constitution would have to be amended.* The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. *To*

meet that the State Legislature would have to amend the constitution.

I take it that a general bill like this would be regarded as authority by the Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.

Mr. Aspinall: *The State Legislature would not do it. The people of the state themselves would have to do it.*

Mr. Benge: Yes, sir.

Subcommittee Hearing on H.R. 1063, p. 23, l. 16 to p. 24, l. 5 (emphasis added).

There it is in a nutshell. Nothing could demonstrate more effectively Congress' intent that §6 authorizes Washington to assume Indian jurisdiction not by legislative action but only conditionally and only upon amendment of the constitution.

One difficulty remains, however, for §6 of Public Law 83-280 authorizes amendment of the constitution "or existing statutes . . . ." Could simple legislative action without constitutional amendment be alternatively authorized by §6 for Washington? Are §6 and §7 interchangeable in some cases?

Such an interpretation will not do. First, it would make §6 and §7 equivalent, and therefore §7 totally redundant in blatant violation of the maxim of avoiding redundancies. Second, not only is another reasonable interpretation permissible, *United States v. Landram,* 118 U.S. 81 (1886), it is required by clear legislative purpose to the contrary. Finally, and providentially, the very problem occurred to Congressman Wesley A. D'Ewart of Montana during Committee deliberations.

Mr. Westland: This amendment would insert two

> new sections. First is section 6, which says: "The consent of the United States is hereby given to the people of any state to amend where necessary their state constitutions or existing statutes, . . ."
>
> Mr. D'Ewart: *I do not think we have to grant permission to a state to amend its own statutes.*
>
> Mr. Abbott: (Counsel) Mr. D'Ewart, I believe *the reason for that is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act [the Enabling Act] and it may be unnecessary, but by some state courts it may be interpreted as being necessary.*

Committee Hearing on H.R. 1063, p. 6, ll. 18-22 and p. 7, ll. 5-11 (emphasis added).

The grant of permission to amend statutes in §6, then, is an extra measure of consent to states with disclaimers of Indian jurisdiction in their constitutions and in their statutes as well. Such consent to statutory amendment is intended to be *in addition* to constitutional amendment even though possibly "unnecessary," and is decidedly not intended to provide an alternative to constitutional amendment. The unusual states with statutory as well as constitutional disclaimers of Indian jurisdiction are Oklahoma,[20] North Dakota,[21] and South Dakota.[22] The extra measure of consent to amend statutes in §6 is limited to those three states.

2. Whether Washington Has Validly Assumed Indian Jurisdiction Is a Federal Question and Involves the Trust Responsibility of the Federal Government Toward Indians

Determination of what state action is required under §6 to trigger conditional amendment of the Enabling Act

20. Oklahoma Statutes Annotated 68 §15.2 (1945).
21. North Dakota Revised Code 57-0208.
22. South Dakota Compiled Laws §5048-53 (1929).

and effect Congress' consent to state assumption of Indian jurisdiction is a federal function deriving from the federal Constitution. *Leser v. Garnett,* 258 U.S. 130 (1922). Only federal interpretation of the effectiveness of the triggering event is controlling. *United States v. Brown,* 334 F.Supp. 536 (D. Nebr. 1971); *Omaha Tribe of Nebraska v. Village of Walthill,* 334 F.Supp. 823 (D. Nebr. 1971); *Leser v. Garnett, supra.* In this case, Congress' own interpretation that the triggering event be a state constitutional amendment is not only decisive, but guaranteed by the final proviso in §6.

In *Tonasket v. State,* (Tonasket 2), 84 Wn.2d 164, 525 P.2d 744 (1974), *appeal dismissed,* 420 U.S. 915 (1975), the Washington court holds that the phrase "where necessary" in §6 transmutes the problem of sufficiency of the triggering event from a federal matter into a state matter. Once safely on its own ground, the Washington court then construes both §4 of the federal Enabling Act and Const. art. 26 as requiring only the consent of the people of the state "speaking through the legislature" to eliminate the constitutional disclaimer.

It is precisely at this point that *Tonasket 2* goes off the rails. The necessity of state constitutional amendment does not derive in the first instance, from §6 of Public Law 83-280, but rather from §4 of the Enabling Act. But §4, and consequently the Compact itself, requires that the disclaimer of Indian jurisdiction be irrevocable without consent of the United States and "the people" of the state. The Compact was adopted by the people of the State of Washington. Since the constitution was approved by the people pursuant to federal mandate, the Compact is between the federal government and the people and cannot

be altered except upon consent of the people *speaking for themselves.* The Washington court begged the question by skipping lightly over the crucial distinction between the people speaking for themselves, and representational speech where the few are authorized to bind the many.

But this distinction was not missed by Congress. Indeed, Congress adverted to it in §4 of the Enabling Act when it stated "the delegates to the conventions . . . *shall declare, on behalf of the people* of said proposed States that they adopt the Constitution of the United States . . . ." This analysis alone destroys the foundation of *Tonasket 2* and with it Washington's attempt to assume Indian jurisdiction. It convinced the Honorable Justices Utter and Stafford of the Washington Court who dissented in *Tonasket 2* and would have held for appellant.

Compacts are peculiarly within the domain of federal law, to be determined by the Supreme Court, even in situations in which a state supreme court attempts to construe a state constitution. In *Dyer v. Sims,* 341 U.S. 22 (1951), the Supreme Court held:

> The Supreme Court of Appeals of the State of West Virginia is, *for exclusively State purposes,* the ultimate tribunal in construing the meaning of her Constitution. Two prior decisions of this Court make clear, however, that we are free to examine determinations

> of law by State courts in the limited field where a compact brings in issue the rights of other states and the United States.

341 U.S. at 28 (emphasis added).

States who are parties to a compact, by accepting it and acting under it, assume the conditions that Congress under the Constitution attached. *Petty v. Tennessee-Missouri Bridge Co.*, 359 U.S. 275, 281 (1959). The rationale is that a national and not merely a regional interest is involved and therefore Congress must exercise national supervision through its power to grant or withhold consent or to grant it under appropriate conditions.[23]

The same rationale applies to the Compact between the federal government and the people of the state of Washington. This is especially so since Indian jurisdiction is federal in nature, having been delegated to Congress in art. 1, §8, cl. 2 of the Constitution. Whenever a state leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation—such as Indian jurisdiction—it subjects itself to that congressional regulation as fully as if it were a private person or corporation. *Parden v. Terminal Ry.*, 377 U.S. 184, 196 (1964), *reh. denied*, 377 U.S. 1010 (1964).

States are not free to assume Indian jurisdiction except upon *strict* compliance with Public Law 83-280. In *Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423 (1971), the Supreme Court rejected an attempt by Montana to assume jurisdiction over the Blackfeet Indian Reservation and its members *without enacting*

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23. Frankfurther and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 694-695.

a statute or amending its constitution. The Supreme Court noted that

> Section 7 of that statute [Public Law 83-280] conditioned the assumption of state jurisdiction on "affirmative legislative action" by the State . . .

400 U.S. at 427, and added

> *Nor was the requirement of affirmative legislative action an idle choice of words . . .*
>
> Our conclusion as to the intended governing force of §7 of the 1953 Act is reinforced by the *comprehensive and detailed congressional scrutiny* manifested in those instances where Congress has undertaken to extend the civil or criminal jurisdictions of certain States to Indian country.

400 U.S. at 427 (emphasis added).

In point of fact, in *Kennerly* the Supreme Court mistakenly assumed that §7 applied to Montana. But the Supreme Court had no need to involve itself with the fine distinctions between §6 and §7 since Montana had not acted at all, neither amending its constitution nor enacting a statute. Clearly Montana failed to satisfy either section and the Supreme Court needed to look no further.[24] Nor did the Supreme Court have the benefit of the newly-discovered Subcommittee and Committee Hearings on H.R. 1063.

Besides, the Supreme Court has since corrected its misapprehension. In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), the Supreme Court struck down Arizona's attempt to assume taxing jurisdiction over Indians residing on the Navajo Reservation without com-

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24. It appears that the Supreme Court's mistaken reference to §7 in *Kennerly* stems from the fact that counsel for all parties mistakenly advised the Supreme Court that §7 was the pertinent section. Had the decision required a comparison between §6 and §7, the mistake would, no doubt, have been uncovered.

plying with Congress' detailed regulations for assuming Indian jurisdiction. Arizona has a disclaimer of Indian jurisdiction identical to Washington's, Arizona Const. art. 20, but has never acted under §6 or §7 of Public Law 83-280. The Supreme Court held:

> the Act expressly provides that the State must act "with the consent of the tribe occupying the particular Indian country," 25 U.S.C. §1322(a), . . . *and* must "appropriately [amend its] constitution or statutes." 25 U.S.C. §1324. Once again, the Act cannot be read as expressly conferring tax immunity upon Indians. *But we cannot believe that Congress would have required* the consent of the Indians affected and *the amendment of those state constitutions which prohibit the assumption of jurisdiction if the states were free to accomplish the same goal unilaterally by simple legislative enactment. See Kennerly v. District Court,* 400 U.S. 423 (1971).

411 U.S. at 177-8 (emphasis added; footnotes omitted).

It is significant that the Supreme Court pointed to §1324, a reenactment of §6 of Public Law 83-280, as a "statutory imperative," 411 U.S. at 179, in striking down Arizona's Indian jurisdiction. The Supreme Court's holding is consistent with its long held canon of construing statutes in favor of Indians. As the Supreme Court held in *Antoine v. Washington,* 420 U.S. 194 (1975):

> The canon of construction applied over a century and a half by this Court is that the wording of treaties and statutes ratifying agreements with the Indians is not to be construed to their prejudice. *Worcester v. Georgia,* 6 Pet. 515 (1832). *See also The Kansas Indians,* 5 Wall. 737, 760 (1867); *United States v. Kagama,* 118 U.S. 375 (1886); *Choctaw Nation v. United States,* 119 U.S. 1, 28 (1886); *United States v. Winans* 198 U.S. 371, 380-381 (1905); *Choate v. Trapp,* 224 665, 676 (1912); *Menominee Tribe v. United States,* 391 U.S. 404, 406, n. 2 (1968). In *Choate v. Trapp, supra,* also a case involving a ratifying statute, the

> Court stated: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." 224 U.S. at 675. *See also Seminole Nation v. United States,* 316 U.S. 286, 296 (1942); *Morton v. Ruiz,* 415 U.S. 199, 236 (1974).

420 U.S. at 199-200.

From an historical perspective the reason for Washington's constitutional disclaimer of Indian jurisdiction and Congress' careful and specific statutory imperative of state constitutional amendment in Public Law 83-280 lies in the trust responsibility of the federal government to Indians. In *United States v. Kagama,* 118 U.S. 375 (1886), the Supreme Court held:

> These Indians *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. *From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power.* This has always been recognized by the Executive and by the Congress, and by this court, whenever the question has arisen.
>
> . . . .
>
> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. *It must exist in that government, because it never has evisted anywhere else, because the theatre of its exercise is within the geographical limits of the*

> *United States, because it has never been denied, and because it alone can enforce its laws on all the tribes.*

118 U.S. at 383-4 (emphasis added).

The "duty of protection" referred to by the Supreme Court in *Kagama* is the trust responsibility of the United States toward Indian tribes and their enrolled members. Exercise of that trust responsibility by the United States is of crucial importance for the very reason that the people of the states in which Indians are found are still often their deadliest enemies.

In view of that fact, it is quite natural that three years after the *Kagama* decision Congress acted in accordance with its trust responsibility by providing in the Enabling Act for the Compact by which Washington disclaimed any Indian jurisdiction until (1) Indian title was extinguished, and (2) Congress consented to state Indian jurisdiction. And, again, it was to be expected that Congress would exercise its trust responsibility in 1953 in the enactment of Public Law 83-280. As stated in *Santa Rosa v. Kings County*, 532 F.2d 655 (9th Cir. 1975):

> The Federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian—a status accompanied by fiduciary obligations. *See Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United States v. Kagama*, 118 U.S. 375 (1886); *Beecher v. Wetherly*, 95 U.S. 517, 525 (1877); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 12 (1831).
>
> While there is legally nothing to prevent Congress from disregarding its trust obligations and abrogating treaties or passing laws inimical to the Indians' welfare, the courts, by interpreting ambiguous statutes in favor of Indians, *attribute to Congress an intent to exercise its plenary power in the manner most con-*

sistent with the nation's trust obligations. See Squire v. Capoeman, 351 U.S. 1, 7-8 (1956).

532 F.2d 655, 660 (emphasis added; footnotes omitted).

To understand the exact manner in which Congress exercised its trust responsibility "in the manner most consistent with the nation's trust obligations" in 1953 in the enactment of Public Law 83-280, it is necessary to re-examine the legislative history of the Act. Senate Report No. 699[25] which accompanied H.R. 1063 contains a letter from Orme Lewis, Assistant Secretary of the Interior, to Honorable A. L. Miller, Chairman, Committee on Interior and Insular Affairs of the House of Representatives, dated July 7, 1953. In his letter, Mr. Lewis points out that the Bureau of Indian Affairs had consulted extensively "with state and local authorities and with the Indian groups" in the five mandatory states and that in each the "State and local authorities indicated their agreeableness to the proposed transfer of jurisdiction."

Elsewhere in Senate Report 699, the Committee recognized the great trust responsibility of the federal government toward Indians by stating that the attitude of the various states and Indian groups within states to be given Indian jurisdiction in the future "should be heavily weighed before effecting transfer."[26] It was precisely to protect Indians from unwanted transfers of jurisdiction to states whose non-Indian citizens did not wish to fulfill their responsibility under such jurisdiction that Congress required in §6 of Public Law 83-280 for the simultaneous

25. Senate Report No. 699, U.S. Code Cong. & Ad. News, 1953, 83rd Cong. at 2411-2412; 83rd Cong., 1st Sess., 99 Cong. Rec. 10782-10783 (1953).

26. Senate Report No. 699, *supra, at* 2412.

amendment of the Enabling Act and the Washington constitution.

As demonstrated by the colloquy in the Subcommittee Hearing, supra, at p. 9, Congress understood perfectly well that the people of the State of Washington would have to amend the Washington constitution *prerequisite* to Washington's assumption of Indian jurisdiction.

As the Supreme Court said in *Kennerly, supra*:

> Nor was the requirement of affirmative legislative action an idle choice of words; the legislative history of the 1953 statute shows that the requirement was intended to assure that *state jurisdiction would not be extended until the jurisdictions to be responsible for the portion of Indian country concerned manifested by political action their willingness and ability to discharge their new responsibilities.*

400 U.S. at 427 (emphasis added).

But since the Washington legislature assumed Indian jurisdiction *without* amendment of the constitution, the people of the State of Washington never manifested by the political action of plebiscite their willingness and ability to discharge their new responsibility. And history subsequent to Washington's assumption of Indian jurisdiction demonstrates that the people of the State of Washington are in fact unwilling and unable to discharge the responsibility of Indian jurisdiction. The failure of Washington's Indian jurisdiction *without consent of the people of the state* is beyond dispute. So appallingly unsuccessful and unequal has state jurisdiction been that three Washington tribes have attempted to have it declared invalid.[27] The Quinault

27. *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970); *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966), *cert. denied*, 387 U.S. 907 (1967); *Confederated Bands and Tribes of the Yakima Nation v. State*, 552 F.2d 1332 (9th Cir. 1977), probable jurisdiction noted, 46 U.S.L.W. 3541.

and Suquamish Indian Tribes have petitioned for retrocession of jurisdiction and partial retrocession has been accomplished.[28]

The failure of Washington's Indian jurisdiction is not unique. Hearings held by Senator Ervin's Committee on Constitutional Rights between 1961 and 1968[29] demonstrated the failure of state Indian jurisdiction nationally and led to the Indian Civil Rights Act of 1968 and its retrocession provisions.

The report[30] of the Montana-North Dakota-South Dakota Joint Advisory Committee to the United States Commission on Civil Rights of August 1974, documents an identical failure of state Indian jurisdiction in those three states.

More recently, as a result of 28 days of hearings at which 250 witnesses testified and 4,500 pages of testimony were taken from tribal, state and local government officials, Task Force IV of the American Indian Policy Review Commission documented the massive failure of Indian jurisdiction in Washington in its "Report on Federal, State and

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28. 34 Fed. Reg. 14288 (Sept. 11, 1969) (Quinault); 37 Fed. Reg. 7353 (April 5, 1972) (Suquamish).

29. *Hearings on Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 87th Cong., 1st Sess., Part 1 (1961), 87th Cong., 1st Sess., Part 2 (1961), 87th Cong., 2d Sess., Part 3 (1962), 88th Cong., 1st Sess., Part 4 (1963); *Hearings on S. J. Res. 40 to Protect the Constitutional Rights of the American Indian, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 89th Cong., 1st Sess. (1965); *Hearings on Rights of Members of Indian Tribes before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs,* 90th Cong., 2d Sess. (1968); *Hearings on Title II of the Civil Rights Act of 1968, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary,* 91st Cong., 1st Sess. (1969).

30. Montana-North Dakota-South Dakota Joint Advisory Committee to the United States Commission on Civil Rights, Indian Civil Rights Issues in Montana, North Dakota, and South Dakota (Aug. 1974).

Tribal Jurisdiction."

The need to protect Indians from mistreatment by state governments was recognized by the five dissenting judges in *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington*, Yakima 1, 550 F.2d 443 (9th Cir. 1977):

> Congress required the mandatory states to assume complete subject matter jurisdiction. It had very little reason to require less of the option states, when and if they accepted the invitation to assume jurisdiction. But Congress had a very good reason for not permitting any state to choose the subject matter jurisdiction that it would assume. *Congress knew that the states wanted the sweet but not the bitter jurisdiction over Indians.* Authorization to states to make their own selections of jurisdiction could lead to the very result that Congress wanted to avoid, that is, letting the states pick only that subject matter jurisdiction from which they could derive benefit and leaving all the onerous matters to the Federal Government. Futhermore, a driving force for passing PL 280 was bringing adequate criminal law enforcement to reservations. Congress knew that in absence of full assumption by a single government, criminal law was a jungle of conflicting jurisdictional problems and fragmented administration that defied effective enforcement.

550 F.2d at 454 (emphasis added; footnotes omitted).

Every Indian tribe in Washington opposes state Indian jurisdiction. The Washington situation is as good an illustration as can be found for demonstrating the wisdom of Congress in requiring in the Enabling Act that Indian jurisdiction not be foisted upon Washington residents *without their own vote of approval.* That requirement was an important legal protection to the life, liberty and property of every Washington Indian citizen.

Appellants anticipate that the state will raise the argument that the State's assumption of Indian jurisdiction over selected Indian reservations only is obviously consistent with Congressional policies since Public Law 83-280 itself exempted three reservations from jurisdiction of the five named states. The answer to this argument is that of the Supreme Court in *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977) in which the Supreme Court stated:

> The statement in *Lonewolf*, [citation omitted] that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the court of congressional power to abrogate treaties, *see generally Antoine v. Washington*, 420 U.S. 94, 201-204, 43 L. Ed.2d 129, 95 S.Ct. 944 (1975), has not deterred this court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. [citations omitted] "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."
>
> . . . .
>
> The standard of review most recently expressed is that the legislative judgment should not be disturbed "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . ."

430 U.S. at 84.

As will be demonstrated below, it cannot be shown that any rational basis existed for Congress to authorize the State to assume total jurisdiction over nine reservations, including the Colville Reservation, but not over the remaining thirteen. Any attempt by Congress to do so would be violative of the Equal Protection Clause of the Fifth Amendment.

3. Washington's Assumption of Total Jurisdiction Over the Colville Indian Reservation Violates the Equal Protection Clause of the Fourteenth Amendment

As seen, under Washington's statutory scheme, nine reservations in the State are subject to total state jurisdiction, but the remaining 13 are, as least prior to *Yakima 2*, subject only to partial state jurisdiction. Taking *Yakima 2* into account, state Indian reservations now fall into two groups: those subject to *total* state jurisdiction and those subject to *no* state jurisdiction.

But the Supreme Court's equal protection test for determining constitutionality of a state statute is that it be rational, that is, (a) it neither disadvantages any suspect class nor (b) infringes on any fundamental interest. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976); *Reed v. Reed*, 404 U.S. 71 (1971); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); *McGowan v. Maryland*, 366 U.S. 420 (1961).

In the *Reed* case, the Supreme Court formulates the test as follows:

> . . . . [T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [citations omitted] The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."

404 U.S. at 75-6.

What is the Congressional purpose of granting states the right to assume Indian jurisdiction under Public Law 83-280? The Supreme Court found in *Bryan v. Itasca County*, 426 U.S. 373 (1976):

> The primary concern of Congress in enacting Pub. L. 280 that emerges from its sparse legislative history was the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.

426 U.S. at 379.

But as will be seen below, Washington's unreasonable arbitrary, unworkable, discriminatory and unequal system does not foster that purpose and fails to meet even the most liberally construed test of rationality.

Consider, for example, the following specific instance:

If a Lummi Indian were to murder another Indian on trust land inside the Lummi Reservation, in the course of the felony of rape, he would be prosecuted in federal court pursuant to 18 U.S.C. §1153, the Major Crimes Act, since *Yakima 2* holds that the State has no jurisdiction on the Lummi Reservation. But if a Colville Indian were to murder another Indian on trust land inside the Colville Reservation in the course of the felony of rape, he would be subject to state jurisdiction under RCW Ch. 37.12 and prosecuted in state court pursuant to RCW 9A.32.030.

The federal Indian defendant (Lummi) who raised the insanity defense would benefit in federal court from the "substantial capacity test", a variation of the Durham Rule. But the state Indian defendant (Colville) who raised the insanity defense would be severely handicapped by RCW 9A.12.010, which prescribes a variation of the M'Naugh-

ton Rule. To prove his defense, the federal Indian defendant need *only* prove mental disease which prevents him from controlling his conduct, even though he knows the difference between right and wrong; but the state Indian defendant must prove either that he was unable to perceive the nature and quality of the act or unable to tell the difference between right and wrong. The federal rule is widely conceded as greatly more advantageous than the state's rule. LeFave and Scott, *Criminal Law*, p. 275.

On the other hand, the Lummi defendant would be prosecuted in federal court under 18 U.S.C. §1111 which provides for the imposition of the death penalty unless the jury lessens it to life imprisonment; whereas the Colville defendant would be punished pursuant to RCW 9A.32.-040 which *limits* the punishment to life imprisonment. The foregoing examples are by no means exhaustive. Additional procedural and substantive differences between federal and state criminal law which underscore the invidious discrimination against Colville Indians inherent in Washington's Indian jurisdictional scheme are catalogued in the Brief of Appellee in *Yakima 2* at pp. 79-80.

No possible rational reason exists why two Indians who commit identical crimes in the State of Washington deserve different burdens of proof in the urging of the insanity defense, and are subject to different possible punishments. Nor does the legislative history of Public Law 83-280 contain any evidence of unusual lawlessness on the Colville Indian Reservation or the absence of adequate tribal institutions for law enforcement. The state can show no valid reason why it should extend state law and order protection to one reservation but not another. Its attempt to do so disadvantages a suspect class, namely, Indians, and

clearly infringes upon the fundamental interest of all Indians in the state to equal protection under the same law, whether it be state or federal. No rational legislative purpose is served by this totally arbitrary statutory scheme. The Equal Protection Clause of the Fourteenth Amendment requires that it be struck down as unconstitutional.

CONCLUSION

The federal questions are substantial and for proper resolution and consideration require briefs on the merits and oral argument. Determination of these questions is necessary to clarify the jurisdictional tangle in which Washington State's Indian reservations have been embroiled since 1956 and to prevent further expenditure of judicial time and effort. Appellants pray that the Supreme Court note probable jurisdiction of this appeal and order it consolidated with *Yakima 2* for oral argument.

Respectfully submitted,

ROBERT L. PIRTLE
Counsel for Appellants

July 10, 1978

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Plaintiffs,

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

Defendants.

No. 3868

CONSOLIDATED DECISION

No. 3909

UNITED STATES OF AMERICA,

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant,

CONFEDERATED BANDS & TRIBES OF THE YAKIMA INDIAN NATION,

Intervenor-Plaintiff.

Before: KILKENNY, Circuit Judge, EAST and TURRENTINE, District Judges*

EAST, District Judge:

These causes, Nos. 3868 and 3909, were by stipulation of the parties consolidated for hearing and submitted to the Court on their respective merits following oral argument at Seattle, Washington on March 28, 1977.

*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of June 20, 1973, of the Honorable

CAUSE NO. 3868

PARTIES:

The plaintiffs are Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe, and Makah Indian Tribe (Tribes).

The defendants are the State of Washington; Charles Hodde, Director, Department of Revenue, State of Washington; Jack G. Nelson, Director, Department of Motor Vehicles, State of Washington; and Robert S. O'Brien, Treasurer, State of Washington (State).

JURISDICTION:

We note jurisdiction of these causes pursuant to 28 U.S.C. § 1362, 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 2281.[1]

HISTORY OF PROCEEDINGS:

This action was commenced on May 17, 1973, and District Judge Powell on November 5, 1973, in conformity with 28 U.S.C. § 2284, issued a temporary restraining order enjoining the State from enforcing its cigarette and tobacco products taxes against the Tribes. By stipulation, the parties agreed to the continuance of the restraining order pending review by the full three-judge District Court. On September 6, 1974, the full Court converted the temporary restraining order into a preliminary injunction. During the ensuing months, discovery proceeded until this Court stayed further proceedings pending the Supreme Court's decisions in *Moe v. Confederated Salish & Kootenai Tribes*

1. 28 U.S.C. § 2281 was repealed by Act of August 12, 1976, Pub. L. No. 94-381, § 1, 90 Stat. 1119. However, this action is not affected thereby since it was pending on the date of enactment. *Id.* § 7.

John F. Kilkenny, Senior U. S. Circuit Judge for the Ninth Circuit, William G. East, Senior U. S. District Judge for the District of Oregon, and Charles L. Powell, Senior U. S. District Judge for the Eastern District of Washington. Thereafter pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of May 10, 1974, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable Howard B. Turrentine, U. S. District Judge for the Southern District of California, in lieu of the Honorable Charles L. Powell, and the redesignation and appointment of the Honorable John F. Kilkenny and the Honorable William G. East.

of the Flathead Reservation, 425.U.S. 463 (1976), and *Bryan v. Itasca County*, 426 U.S. 373 (1976). Following the Supreme Court's disposition of those cases and after extensive discovery proceedings and briefing, the causes with the issues refined were submitted for decision upon stipulated facts as supplemented by deposition testimony and affidavits.

THE TRIBES' CAUSE:

The Tribes now seek declaratory relief, with injunctive enforcement, from the State's statutes and administrative regulations imposing taxes and collection procedures upon on-reservation sales to nonmembers of the Tribes by tribally licensed retailers (Dealers) of cigarettes (R.C.W. 82.24) and tobacco products (R.C.W. 82.26), and from the State's statutes and administrative regulations imposing taxes upon motor vehicles (R.C.W. 82.44) and mobile homes, travel trailers and campers (R.C.W. 82.50) owned by the Tribes and/or their members residing within the reservations. In addition, the Tribes seek damages against the State arising out of actions taken to enforce assessments of the challenged cigarette taxes. The Tribes also seek declaratory relief, with injunctive enforcement, from the State's exercise of civil and criminal jurisdiction over the Tribes and their members residing on the reservations (R.C.W. 37.12).

STATES DEFENSE AND CAUSE:

The State generally contests the Tribe's claims and seeks declaratory relief of lawful enforcement of its challenged taxing schemes as presently administered.

FACTS:

A. *Tribes*:

Each of the Tribes is a United States Government recognized sovereign Indian tribe governed by a business or tribal council under a constitution and bylaws approved by the Secretary of Interior.[2]

The Colville Indian Reservation was established by

2. Although the Lummi and Colville Tribes have a constitution approved by the Secretary of the Interior, the respective members of the Tribes voted in 1935 not to come under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, *et seq*. The Makah Tribe, on the other hand, is organized under the Indian Reorganization Act.

Presidential Executive Order on July 2, 1872, 1 Kapler, Indian Affairs, Laws and Treaties, 916 (2d Ed. 1904), and encompasses 1.3 million acres in the northeastern section of the state. Approximately 3,200 of the Tribe's 5,800 enrolled members live on the reservation, constituting about 46 percent of the total population.

The Lummi Indian Reservation was established by the treaty of Point Elliot in 1855, 12 Stat. 927, and encompasses 7,319 acres primarily upon a peninsula near Bellingham, Washington. About 1,250 of the Tribe's 2,000 enrolled members live on the reservation.

The Makah Indian Reservation was established by treaty in 1855, 12 Stat. 939, and encompasses 28,000 acres at the northwestern tip of the Olympic Peninsula. Approximately 900 of the Tribe's 1,000 members live on the reservation, constituting about 63 percent of the total population of the reservation.

Each of the reservations is isolated and underdeveloped; most essential goods and services are located off the resercations.[3] Most Indian households on the reservations own at least one automobile, and the Tribes own numerous motor vehicles. While some of the tribally and individually owned vehicles are operated exclusively on the reservation, others are operated on and off the reservation. Many Indian families reside in mobile homes on the reservations, and other Indian families are obligated for the purchase or have planned the future purchase of mobile homes for on-reservation location. The Colville and Makah Tribes are plagued by unemployment rates of 33 percent and 60 percent, respectively, and all of the Tribes are desirous of economically developing their reservations to stimulate employment and generate additional tax revenues to help fund programs run by the tribal governments. These programs are designed to improve the economic well-being, health, education and social welfare of the Tribes' members.

B. *State's Enforcement of the Statutes*:

The State has for a period of nine years attempted to

3. There is no dispute over the demarcation of the exterior boundaries of the several reservations.

tax cigarettes and tobacco products sold by Indians on the Tribe's reservations. Presently the cigarette tax amounts to $1.60 per carton. The tax is imposed by requiring Dealers to sell only cigarettes to which tax stamps have been affixed. Dealers are permitted to purchase either prestamped cigarettes or a supply of stamps from the State which are affixed to the cigarettes by the Dealer prior to sale, in which case the Dealer is entitled to a specified rate of reimbursement from the State. However, WAC 485-20-192 (Rule 192) and excise tax bulletin ETB 504.08.192, November 24, 1976, restrict the taxes on cigarettes and tobacco products to sales to non-Indians by Indian tribes and Indians, as defined therein. That is, the State construes the taxes as being inapplicable to sales to Indians for their own use or for on-reservation resale to other Indians.[4]

Under R.C.W. 82.24.090, 82.32.070, Rule 192 and the excise tax bulletin, Dealers are required to keep certain specified records related to taxable and nontaxable transactions. Neither the Tribes nor their Dealers have sought authorization from the State to possess unstamped cigarette products and each has professed that it will not comply with State's cigarette and tobacco product taxing scheme.

On December 19, 1972, in an effort to enforce the cigarette taxing scheme, the State issued orders to tribal outlets on each reservation assessing unpaid taxes alleged to be due under R.C.W. 82.24, and in April, 1973, resorted to seizures of unstamped cigarettes in the stream of interstate commerce and bound for the Tribes' reservations. Furthermore, the State declared its intention to continue such seizures in the future; however, such seizures were temporarily enjoined as above delineated.

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4. Initially, the State claimed the right to tax all tribal cigarette sales regardless of whether they were made to Indians or non-Indians. This contention was asserted on theory that the congressional grant of civil jurisdiction to the states conferred by Pub. L. No. 83-280 (see discussion of the State's assumption of Indian jurisdiction, *infra*) encompassed a grant of power to tax reservation Indians. However, this theory was rejected by the Supreme Court in *Bryan*. Accordingly, the State has narrowed its claims and now argues only that it may tax tribal cigarette sales to nonmembers of the Tribes.

C. *Tribal Retailers' Taxing Schemes*:

Each Tribe, during the pretrial development of the ultimate issues in these causes, enacted ordinances regulating the sale, distribution and taxation of cigarettes and tobacco products on its reservation. Each tribal ordinance was approved by the Secretary of Interior of the United States. Pursuant to the respective ordinances, the Tribes have established one or more tobacco outlets on their respective reservations.

The Dealer at each tribal tobacco outlet is a federally licensed Indian trader and a tribally licensed dealer who manages the tribally owned tobacco business outlet. Simultaneously, the Dealer at each tribal tobacco outlet, except at the Makah Resort, manages his own separate business of selling a variety of merchandise at retail. As remuneration for managing a tribal tobacco outlet, each Dealer is entitled to retain the gross revenue derived from sale of cigarettes and tobacco products in excess of the wholesale distribution price and excise tax levied by the respective Tribe.

All cigarettes and tobacco products are purchased with federally restricted tribal funds and from authorized wholesalers outside the state, which are shipped directly to the respective Tribes by sealed cargo trucks of Interstate Commerce licensed carriers. Distribution is made to the Dealers when tribal cigarettes taxes fixed by the tribal or business council are collected.

The tribally levied cigarette tax ranges from forty to fifty cents per carton. Tribal ordinances read that the cigarette tax imposed by each Tribe is a tax upon distribution of cigarettes on the reservation by the respective Dealers, and the tax must be added to the retail selling price. The Tribes' cigarette taxes are an important source of revenue for the funding of the Tribes' sponsored programs for social and economic development. For example, from 1972 through 1976, during which time the Tribes refused to impose the State's cigarette taxes, the Colville Tribe earned approximately $265,760 from its cigarette tax while the Lummi and Makah Tribes earned approximately $54,440 and $13,490, respectively, from their cigarette taxes.

Due to the competitive advantage enjoyed by the Tribes

over retailers who do impose the State's tax, nearly 90 percent of the Tribes' sales are made to non-Indians. The State tacitly concedes the Tribes' source of cigarette tax revenue would dry up if they were forced to add the State tax to the cost of their cigarettes. The facts dictate that the tribal taxes could not be a continuing source of income if tribal cigarette sales to non-Indians are also subject to State's cigarette tax; tribal cigarette sales to non-Indians would be eliminated and the cigarette sales commerce between the Tribes and non-Indians would be destroyed. Thus, each Tribe's ability to fund its sponsored programs would suffer substantial interference.[5]

The Tribes' ordinances exercised police power as well as taxing power. The respective ordinances provide:

(a) The tobacco products, including cigarettes, shall remain the property of the Tribe until sold to the ultimate customer;

(b) A Dealer shall first obtain tribal and federal trader's licenses supported with adequate person and property liability insurance coverage on the Dealer's premises;

(c) A Dealer shall not sell tobacco products, including cigarettes, to minors, nor more than a limited number of cartons of cigarettes per non-Indian sale; and

(d) For violation penalties.

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5. Cigarettes are highly price elastic and even a small difference in price can have a substantial effect on purchasing habits. Although the Tribes impose a tax of about 40 to 50 cents per carton, a carton of cigarettes sells for about $1.10 to $1.20 less on the reservation than off the reservation. If, however, the tribal and State taxes were imposed, a carton of cigarettes would cost 40 to 50 cents more per carton on the reservation than off the reservation.

See the affidavit of Mr. Ronald L. Trosper, an economist who specializes in the area of American Indian economic development. He received his Ph.D. in Economics from Harvard in 1974, is a member of the American Economic and Western Economic Associations and has served as a consultant to the American Indian Policy Review Commission and to several Indian tribes. He has also published articles in the field of Indian economic development. At the time he rendered his opinion, he was familiar with the State and tribal taxing ordinances, the economic conditions on the reservations and the factors which influence the sale of cigarettes. The State does not dispute his qualifications as an expert.

In short, each ordinance reads as a comprehensive scheme for the licensing, regulation and taxation of the sale of cigarettes on the reservations.

D. *State's Assumption of Civil and Criminal Jurisdiction*:

State's assumption of civil and criminal jurisdiction over Indians and Indian tribes has been previously discussed by the United States Court of Appeals for the Ninth Circuit. *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 552 F.2d 1332 (9th Cir. 1977) (*Yakima 2*); *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 550 F.2d 443 (9th Cir. 1977) (*Yakima 1*); and *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648 (9th Cir. 1966). We find no need here for elaboration of those discussions.

We take judicial notice that prior to 1953, the Federal Government exercised exclusive jurisdiction over Indian tribes and their reservations.[6] In 1953, Congress enacted the Act of August 15, 1953, Pub. L. No. 83-280, Ch. 505, 67 Stat. 588-90, which provided five named states with criminal and civil jurisdiction over Indians and Indian reservations and provided that certain other "option" states (including the State), with constitutional or statutory disclaimers of Indian jurisdiction, could assume such jurisdiction by amending their constitutions or statutes where necessary to do so.

The State's legislature has asserted civil and criminal jurisdiction over Indians and Indian reservations pursuant to the authority of Laws of 1957, Ch. 240, as amended by Laws of 1963, Ch. 36, codified as R.C.W. 37.12. In the absence of a tribe's consent, the State assumed jurisdiction over Indians on nontrust land and non-Indians on trust and nontrust land to the fullest extent permissible under Pub. L. No. 280.[7]

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6. This principle was first established in *Worcester v. Georgia*, 31 U.S. 515 (1832). And over the years only certain limited exceptions were carved out. *E.g.*, *New York ex rel. Ray v. Martin*, 326 U.S. 496 (1946), state court jurisdiction over crimes committed by non-Indians against each other on Indian reservations.

7. The scope of civil jurisdiction offered by Pub. L. No. 280 was apparently quite limited. The primary concern of Congress in enacting Pub. L. No. 280 was to combat lawlessness on Indian reservations, Bryan, 426 U.S.

With respect to trust land, the State assumed jurisdiction over Indians only as to eight subject matter areas.[8] As to consenting tribes, the State obligated itself to assume jurisdiction "to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state." R.C.W. 37.12.021. The Colville Tribe has so consented, while the Makah and Lummi Tribes have not. Accordingly, the State asserts "total" jurisdiction over the Colville Tribe, but only "partial" jurisdiction over the Makah and Lummi Tribes.

DISCUSSION AND CONCLUSIONS:

A. *Jurisdictional Issues*:

(1) *State's Assumption of Indian Reservation Jurisdiction*:

At the outset, we are faced with the State's contention

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at 379, and Congress was concerned only secondarily with extending the scope of the states' civil jurisdiction. The Supreme Court found that Pub. L. No. 280 did not confer the power to assume general civil regulatory authority. Rather, in this regard it relates only to the application of state civil law to court proceedings. *Id.*

8. R.C.W. 37.12.010 provides:

"The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of R.C.W. 37.12.021 [tribal consent] have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted."

that this Court, as a statutory three-judge district court, has no jurisdiction over the Tribes' claim that the State's assumption of Indian reservation jurisdiction, pursuant to R.C.W. 37.12, was, *inter alia*, violative of the Equal Protection Clause of the Fourteenth Amendment.

Prior to the enactment of Pub. L. No. 94-381, 28 U.S.C. § 2281 required the designation of a statutory three-judge District Court whenever an action based upon a substantial United States constitutional question sought to enjoin the enforcement of a state statute of state-wide application. A claim is constitutionally insubstantial only if it is "essentially fictitious," "obviously frivolous," "wholly insubstantial" or "obviously without merit"; that is, "if its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby v. Osser*, 409 U.S. 512, 518 (1973). The decision in *Yakima 2* forecloses the State's contention that the Tribes' Fourteenth Amendment claim is insubstantial.

Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962), teaches that in order for such jurisdiction to be appropriate, there must be some basis for injunctive relief. Failure to name any individual official with enforcement responsibility has in the past influenced the United States Court of Appeals for the Ninth Circuit in upholding a District Court's refusal to convene a three-judge court. *Sellers v. Regents of University of California*, 432 F.2d 493, 497-98 (9th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971). The State argues the Tribes have failed to name "as defendants any state officers with significant responsibility for enforcing the full range of state civil and criminal laws on plaintiff's reservations" and that as a consequence this Court "probably" lacks jurisdiction over the appropriate officials which would render any injunction issues "largely illusory." We take this to be a claim that three-judge District Court jurisdiction is lacking because there is no basis for injunctive relief.

The only state officers named as defendants in this action are the State Treasurer, the Director of the State Department of Revenue, and the Director of the State De-

partment of Motor Vehicles. These defendants were named because they have enforcement responsibility over the challenged taxation statutes. It is now clear that the validity of State's assumption of Indian reservation jurisdiction has no relationship to the validity or invalidity of its cigarette and tobacco products taxing scheme as applied to sales by Dealers. *Cf. Bryan.*

Fed. R. Civ. P. 65(d) provides that an order granting an injunction binds, among others, "the parties to the action, their officers, agents, servants, employees, and attorneys." The State has been made a party to this action and, except for the immunity guaranteed it by the Eleventh Amendment to the United States Constitution, any injunctive enforcement issued by this Court would bind State's officers who have the requisite enforcement responsibility.

The State has statutorily waived its Eleventh Amendment immunity to suit in its own courts, R.C.W. 4.92.100. However, such a waiver does not extend to federal court actions. *Ford Motor Co. v. Dept. of Treasury of Indiana,* 323 U.S. 459 (1945). Furthermore, the State has not authorized its court counsel to waive the immunity. *Skokomish Indian Tribe v. France,* 269 F.2d 555 (9th Cir. 1959). *See also Ford Motor Co.* Nevertheless Congress, in the exercise of its enumerated powers, may strip a state of its Eleventh Amendment immunity. *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976); *Parden v. Terminal R. Co.,* 377 U.S. 184 (1964). Given the rationale used by the Court in *Moe* (425 U.S. at 472-75) in construing 28 U.S.C. § 1362, we must conclude that Congress has removed the states' Eleventh Amendment immunity when a suit is brought by an Indian tribe. *Aquilar v. Kleppe,* 424 F. Supp. 433, 436 (D. Alas. 1976). We conclude the State is a proper party defendant in this Court and any injunctive enforcement issued against it would run against its officers charged with the requisite enforcement responsibility.

(2) *Tax Claims*:

The parties agree that this Court has jurisdiction over the Tribes' attack on State's cigarette and tobacco products taxing schemes; however, a footnote in *Moe* necessitates

a comment. The Tribes' only "constitutional" attack on the validity of the state taxing measures themselves is that those measures are violative of the Indian commerce provision of the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.[9] Note 17 in *Moe* states that after *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), attacks on the validity of state statutes imposing taxes upon reservation Indians raise only Supremacy Clause issues which do not fall within the scope of 28 U.S.C. § 2281.[10] Nevertheless, in *Moe* a three-judge court had properly been convened because the case had been filed prior to the decisions in *Mescalero* and *McClanahan*. Similar treatment here is precluded because this action was commenced approximately seven weeks after those decisions.

Notwithstanding the language in *Moe*, we conclude this Court has jurisdiction over the Tribes' challenge of the State's statutes providing for the enforcement of its taxing measures through the declaration and seizure as contraband of unstamped cigarettes moving in interstate commerce. That claim raises a substantial federal question under the Commerce Clause.[11]

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9. Although the Tribes mount several other attacks on State's taxing scheme which are discussed *infra*, these attacks depend in the final analysis upon invocation of the Supremacy Clause and, therefore, do not require the convocation of a three-judge court. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

10. "It is thus clear that the basis for the invalidity of these taxing measures [imposing taxes on reservation Indians], which we have found to be inconsistent with existing federal statutes, is the Supremacy Clause, U. S. Const., Art. VI, cl. 2, and not any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine as laid down originally in *M'Culloch v. Maryland*, 4 Wheat. 316 (1819). If so, then the basis for convening a three judge court in this type of case has effectively disappeared, for this Court has expressly held that attacks on state statutes raising only Supremacy Clause invalidity do not fall within the scope of 28 U.S.C. § 2281. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). Here, however, the District Court properly convened a § 2281 court, because at the outset the Tribe's attack asserted unconstitutionality of these statutes under the Commerce Clause, a not-insubstantial claim since *Mescalaro* and *McClanahan* had not yet been decided. *See Goosby v. Osser*, 409 U.S. 512 (1973)." *Moe*, 425 U.S. at 481 n. 17.

11. The Tribes attack these statutes only insofar as the State seeks to apply them to the Tribes. Nevertheless the Supreme Court has held that

The State's assertion that it may seize such shipments depends on the validity of the imposition of taxes in the first instance. Thus, a valid challenge to the validity of the taxes could vitiate the need to review the constitutionality of the enforcement provisions. It is clear that a three-judge District Court properly convened has the power to dispose of a case on any ground presented to it. *Florida Lime & Avocado Growers v. Paul,* 373 U.S. 132 (1963); *United States v. Georgia Pub. Serv. Comm'n,* 371 U.S. 285 (1963). Not only does the Court have jurisdiction to adjudicate such issues but to do so furthers the well established principle of deciding constitutional issues only if necessary. *Hagans v. Lavine,* 415 U.S. 528 (1974); *Rosado v. Wyman* 397 U.S. 397 (1970); *King v. Smith,* 392 U.S. 309 (1968); and *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 347 (1936). Finally, since this Court has expended substantial judicial time with the issues, it is in the interest of "judicial economy, convenience and fairness to [the] litigants" (*United Mine Workers v. Gibbs,* 383 U.S. 715, 726 (1966)) to retain jurisdiction over these claims.

(3) *State's Claims for Relief*:

The State seeks a declaratory judgment that its statutes and regulations pertaining to the taxation of retail on-reservation sales of cigarettes, tobacco products and other reservation produced products are valid. Such claim is largely superfluous since, with the exception of the retail sales tax question, the substantive issues raised by these claims must be met by the Court in passing upon the claims of the Tribes. The Tribes have not, however, challenged the validity of the State's general retail sales tax, R.C.W. 82.08. It has been long recognized that absent congressional authorization or possibly their own consent, Indian tribes enjoy immunity from suit in federal, state or tribal courts. *Puyallup Tribe v. Washington Game Dept.,* 97 S. Ct. 2616 (1977); *Turner v. United States,* 248 U.S. 354 (1919); *Hamilton v. Nakai,* 453 F.2d 152, 158-59 (9th Cir. 1972). This immunity extends to freedom from suit on cross claims. *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506 (1940). Since the Tribes have

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a three-judge court is required whether the statute was attacked on its face or as applied. *Dept. of Employment v. United States,* 385 U.S. 355 (1966); *Steffel v. Thompson,* 415 U.S. 452, 457 n. 7 (1974).

not consented to suit, this Court has no jurisdiction to entertain the State's claims for declaratory relief.[12]

The fact that State might by way of recoupment reduce its liability does not grant it a right of action for affirmative relief. *Bull v. United States,* 295 U.S. 247 (1935).

B. *Subject Matter Issues:*

(1) *Cigarette Tax Issues:*

A decision in this case has been delayed because at one time the parties thought the Supreme Court's forthcoming decisions in *Bryan* and *Moe* would be dispositive of the issues presented here. *Bryan,* in eliminating the State's claim that the grant of civil jurisdiction in Pub. L. No. 280 was a congressional grant of authority to the states to impose taxes upon reservation Indians, did help to narrow the issues presented here. However, *Moe* has generated more confusion or disagreement between the parties than it eliminated. The State maintains that *Moe* resolved most of the remaining issues in its favor while the Tribes argue that *Moe* is distinguishable in some respects and that the Supreme Court reserved decision in others.

In *Moe,* the Confederated Salish & Kootenai Tribes and some of their members brought two actions seeking declaratory and injunctive relief against Montana's cigarette and personal property taxes and vendor licensing statutes as applied to tribal members living on the reservation. The Supreme Court affirmed the rulings of the three-judge District Court, holding that "the personal property tax on personal property located with the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business for the Tribe on reservation land; and the cigarette sales tax, as applied to on-reservation sales by Indians to Indians, conflict with the

12. The State urges that a provision in the corporate charter of the Makah Tribe constitutes a consent to suit. Since such consent would amount to a waiver of what amounts to sovereign immunity, its terms "must be strictly observed and exceptions thereto are not to be implied." *Soriano v. United States,* 352 U.S. 270, 276 (1957). *Cf. United States v. Sherwood,* 312 U.S. 584 (1941). Consent by a tribe to suit in its corporate capacity does not constitute consent to suit against the tribe in its governmental capacity. *Namekagon Dev. Co. v. Bois Forte Res. Hous. Auth.,* 395 F. Supp. 23 (D. Minn. 1974), *aff'd,* 517 F.2d 508 (8th Cir. 1975).

congressional statutes which provide the basis for decision with respect to such impositions. *McClanahan, supra; Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973)." *Id.* at 480-81. The Court also upheld the District Court's ruling that Montana's cigarette sales tax was valid as applied to on-reservation sales by Indians to non-Indians and that Montana could with respect to such sales "require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement" (*id.* at 483) of the tax without placing an unconstitutional burden on tribal self-government or conflicting with any congressional statute. Since the Court found that the Montana cigarette tax was levied upon the non-Indian consumer rather than the tribe or the Indian retailer, the holding did not conflict with the general rule that absent congressional consent, taxation of "Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation" is impermissible. *Mescalero,* 411 U.S. at 148.

In its attempt to distinguish *Moe,* we are met at the outset with the Tribes' contention that unlike in *Moe,* the tax here must fail because the legal incidence of the tax is imposed directly upon the Tribe or Indian retailer rather than the non-Indian consumer. The State concedes that if the statute is so construed, the tax must fail. The State, however, pointing to the language of its retail sales tax enactment, a recent amendment to its cigarette tax Act, and judicial and administrative construction thereof, argues that at least with respect to sales by Indian retailers, the legal incidence of the tax falls upon the non-Indian consumer.

In situations wherein federal immunity is affected by a determination as to which party to a transaction bears the legal incidence of a state tax, the federal courts "are not bound by the state court's characterization of the tax." *First Agricultural Bank v. Tax Comm'n,* 392 U.S. 339, 347 (1968). For purposes of deciding federal constitutional questions, "where a state requires that its sales tax be passed on to the purchaser and be collected by the vendor from him, this establishes as a matter of law that the legal incidence of the tax falls upon the purchaser." *United States v. Mississippi Tax Comm'n,* 421 U.S. 599, 608 (1975)

See also First Agricultural Bank; Kern-Limerick v. Scurlock, 347 U.S. 110 (1954); *Alabama v. King & Boozer*, 314 U.S. 1 (1941). This is true notwithstanding the fact that the seller is legally liable for payment of the tax. *Mississippi Tax Comm'n*, 421 U.S. at 607.

The State in arguing that the legal incidence of the cigarette tax falls upon the non-Indian buyer, rather than tribal sellers, relies by analogy on the provisions of State's general sales tax. R.C.W. 82.08. Such reliance is misplaced. The sales tax statute specifically provides that the sales tax shall be paid by the buyer to the seller, that each seller shall collect the tax from the buyer, and that the amount of the tax "shall constitute a debt from the buyer to the seller." In addition, it provides that the tax shall be stated separately from the selling price and not be included in the sales price of an item. R.C.W. 82.08.050. Under the standards announced by the Supreme Court, such terms would appear to require a finding that the legal incidence of the tax, as a matter of law, falls upon the purchaser. The cigarette tax by contrast does not have similar provisions. Of particular importance is the absence of any provision requiring that the tax be passed on to the buyer. Thus, the decisions of the Supreme Court do not necessarily require a conclusion that the legal incidence of State's cigarette tax is on the buyer.

Although the statutory language does not irresolutely lead to a conclusion that the legal incidence of the tax falls upon the purchaser, it also does not necessarily require the contrary conclusion that it falls upon the seller. In the final analysis, the key to making the determination is the divination of legislative intent. *First Agricultural Bank*, 392 U.S. at 348. If recourse to the statutory language alone is inadequate, this Court may certainly seek guidance from the interpretations of the enactment by State's judiciary and its executive officers.

In determining the legislature's intent, the obvious starting point must be the language of the applicable statute. The basic structure and intended scope of the statute is set out in R.C.W. 82.24.020 and 82.24.080. The former section imposes the tax and provides in part:

"There is levied and there shall be collected as herein-

> after provided, a tax upon the sale, use, consumption, handling, possession or distribution of all cigarettes in an amount equal to the rate of six and one-half mills per cigarette."

Prior to 1972, § 82.24.080 provided in part:

> "It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, or distributed within this state and to collect the tax from the person who first sells, uses, consumes, handles, or distributes them in the state."

In 1972, this section was amended to read as follows:

> "It is the intent and purpose of this chapter to levy a tax on all of the articles taxed herein, sold, used, consumed, handled, possessed, or distributed within the state and to collect the tax from the person who first sells, uses, consumes, handles, possesses (either physically or constructively in accordance with RCW 82,24.020) or distributes them in this state. . . .
>
> "It is also the intent and purpose of this chapter that the tax shall be imposed at the time and place of the first taxable event occurring within this state."

Referring to the statutory language, the Tribes point out that tribal retailers possess, handle, and distribute the cigarettes within the state of Washington prior to their sale to the non-Indian buyers. Then pointing to the additional language that the tax is to be imposed upon the occurrence of the first taxable event within the state, they contend that particularly in the absence of a pass-on provision, it is inescapable that the legal incidence of the tax is imposed on the tribal retailers. The Tribes claim the legislature's intent to impose the legal incidence of the tax upon the seller is further supported by the decisions of the Washington Supreme Court in *Makah Indian Tribe v. Tax Comm'n*, 72 Wash. 2d 613, 434 P.2d 580 (1967), and *Canteen Service, Inc. v. Washington*, 83 Wash. 2d 761, 522 P.2d 847 (1974). In *Makah*, the Court upheld the imposition of the cigarette excise tax upon sales by Washington wholesalers to the Makah Tribe on the theory that the legal incidence of the tax fell on the wholesaler rather

than the Tribe as purchaser. In *Canteen Service,* the Washington Supreme Court, holding that the retail selling price for purposes of determining the amount of the general sales tax to be applied to the sale of cigarettes included the excise tax paid on the cigarettes, stated:

> "The legal incidence of the cigarette stamp tax is upon 'the person who first sells, uses, consumes, handles, . . . or distributes them in the State.' RCW 82.24.080. *Thus, the legal incidence of the tax will fall upon the one who first brings the cigarettes into the state and does any of the mentioned acts."* 522 P.2d at 848. (Emphasis added).

The State candidly admits that in *Canteen Service,* the Washington Supreme Court held that the legal incidence of the cigarette tax fell upon the retailer but nevertheless maintains that *Canteen Service* is not dispositive of this case.

Focusing on the statutory language which imposes the tax upon the occurrence of the first taxable event, the State reads the statute as imposing the legal incidence of the tax upon the seller where the transaction takes place within the state and involves only non-Indians, but upon the buyer where the transaction involves an on-reservation sale by an Indian to a non-Indian. The State reaches this conclusion by construing the first taxable event langauge as doing more than merely referring to the first in the series of events enumerated in R.C.W. 82.24.020 and .080. The State argues that properly construed, the statutory language means that an enumerated event is not the first taxable event unless it is constitutionally taxable. Assuming that to be the case, since an Indian retailer is exempt from the imposition of the tax under the Supremacy Clause, it follows that the first taxable event would be the use or consumption by the non-Indian buyer. Conversely, where the transaction involves a seller who is not immune from state taxation, as in *Canteen Service,* the first taxable event would be his possession, handling or distribution of the cigarettes and the legal incidence of the tax would be upon him rather than the purchaser.

The State Department of Revenue has officially adopted the interpretation of R.C.W. 82.24.080 urged on this Court and has published its conclusion in E.T.B. 504.08.192.[13]

The Tribes urge this Court to give no weight to the excise tax bulletin on the theory that it is "a clear subterfuge" and "an attempt to rewrite RCW 82.24.080 in order to make it valid . . . ." While we recognize that the State's agencies have no power to amend state legislation by administrative rules or bulletins, it is proper to give weight to such pronouncements in determining the meaning of its statutes. *Pierce County v. State,* 66 Wash. 2d 728, 404 P.2d 1002 (1965); *Pringle v. State,* 77 Wash. 2d 569, 464 P.2d 425 (1970).

This interpretation also draws support from several other sources including a recent amendment to the cigarette tax statute. In September, 1970, in response to an inquiry from a member of the state legislature, the Attorney General of the state of Washington issued an opinion, AGO 1970 No. 20, which recognized that the legal incidence of the tax could shift depending on the circumstances surrounding the sale. In part, this opinion stated that in situations wherein State lacked jurisdiction to impose its cigarette tax upon Indian retailers, "if the purchaser from such retailer is a non-Indian . . . the duty to buy the cigarette excise tax stamps, and thereby to pay the tax, devolves on

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13. E.T.B. 504.08.192 provides in part:

"Under the holding of our Court in *Canteen Service, Inc. v. State,* (83 W.2d 761) and *Tonasket v. State* (84 Wn.2d 761) the cigarette tax and tobacco products tax apply upon the 'first taxable event' in this state. This makes a different measure for the sales tax in the case of sales by Indians to non-Indians than is the case for a taxable sale by a non-Indian.

"a. *Sale by an Indian to a Non-Indian:* Here the first taxable event is the possession by the non-Indian and therefore the cigarette or tobacco products tax due on the sale is not a part of the selling price on which the sales tax is due.

"b. *Sale by a Non-Indian*: Here the taxable incidence falls on the first handler, distributor, or seller and thus the first taxable event occurs when the products are first handled, distributed, or sold within this state. Since this occurs prior to the retail sale, the cigarette or tobacco products tax is part of the selling price, even in the case of sales, which are sales tax exempt under paragraph 2, above. *Canteen Service, supra.*"

this purchaser . . . ." *Id.* at 13 n.5.[14] Of more significance is the language in *Tonasket v. State*, 84 Wash. 2d 164, 525 P.2d 744 (1974), which decision was issued by the Washington Supreme Court shortly after its decision in *Canteen Service*. In *Tonasket*, the Washington Supreme Court affirmed the imposition of the State's cigarette tax upon the sales by reservation Indians to non-Indians. After noting that imposition of the tax upon sales involving only reservation Indians would likely be barred by *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965), the Court stated:

> "The tax here sought to be imposed upon Mr. Tonasket's cigarette sales to non-Indians is, among other things, one levied upon the 'use' and 'consumption' of the cigarettes. By Laws of 1972, 1st Ex. Sess., ch. 157, § 4, the legislature amended RCW 82.24.080, by proclaiming it to be also the intent of the chapter that the cigarette tax be imposed at the time and place of the first taxable event. If this legislative declaration be an expression of what the legislature always intended with respect to RCW 82.24.080, then, since Mr. Tonasket was purchasing cigarettes from an Oregon distributor for resale to reservation Indians as well as to non-Indians, *it would appear logical to conclude that the first taxable event would be the resale of the cigarettes to a non-Indian*, at which time Mr. Tonasket could be required to affix the tax stamp and collect the amount of the tax from a non-Indian customer." 525 P.2d at 754. (Emphasis added).

Although the language is somewhat unclear since the Court denominated the taxable event as the resale of the cigarettes, given the focus of the Court on the statute's alternative applicability to use or consumption and the commonly imposed requirement that use taxes be collected by retailers, it seems safe to conclude that the Court meant that the use or consumption was the taxable event and

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14. A major premise of the opinion was that Pub. L. No. 280 was a congressional grant of power to the states to assume civil jurisdiction over the reservation Indians including the power of taxation. The fact that this theory was later repudiated by the Supreme Court in *Bryan* does not detract from the opinion's comment on the legal incidence issue.

thus recognized that the legal incidence of the tax could shift depending on the circumstances of the transaction.

Finally, the legislature itself gave a strong indication that it interpreted the legal incidence of the tax as falling upon the non-Indian purchaser in transactions involving on-reservation sales to non-Indians in a 1975 amendment to the cigarette tax Act. As amended in 1975, R.C.W. 82.24.260 provides in part:

> "Any retailer who sells or otherwise disposes of any unstamped cigarettes other than . . . a federally recognized Indian tribal organization with respect to sales to enrolled members of the tribe *"shall collect from the buyer or transferee thereof the tax imposed on such buyer or transferee by RCW 82.24.020* . . . and remit the same to the department . . . ." (Emphasis added).

In sum, this Court concludes the statute evidences the legislature's intent to impose the legal incidence of the tax at the earliest constitutional opportunity. Where on-reservation tribal sales to non-Indians are involved, the first taxable event is, therefore, the use or consumption by the non-Indian purchaser. In such situations, the legal incidence falls upon the non-Indian purchaser rather than the tribal seller.[15]

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15. A similar conclusion cannot be reached with respect to State's tobacco products tax. R.C.W. 82.26. Although the parties have discussed the cigarette and tobacco products taxes as if they stand or fall together, the statutory language of the latter makes it clear that the legal incidence of the tax falls upon the Dealer. Actually State imposes two taxes upon specified tobacco products other than cigarettes. "A floor stocks tax is . . . imposed upon every distributor of tobacco products" by R.C.W. 82.26.020(2). The Dealers are clearly distributors within the terms of the statute since distributor is defined to include "any person engaged in the business of selling tobacco products in this state who brings, or causes to be brought, into this state from without the state any tobacco products for sale." R.C.W. 82.26.010(3). The second tax is "upon the sale, use, consumption, handling, or distribution of all tobacco products" in Washington. R.C.W. 82.26.020(1). Unlike the cigarette tax, there is no statutory language imposing the tax upon the first taxable event. Rather the tax is imposed when "the distributor (a) brings, or causes to be brought, into this state from without the state tobacco products for sale." R.C.W. 82.26.020(1). Thus, in both instances the legal incidence falls upon the Dealer and the tax is invalid.

Having concluded that insofar as on-reservation sales to non-Indians are concerned, the State imposes a tax upon the use or consumption of cigarettes by non-Indians, the legal incidence of which falls upon them, we turn to a consideration of the Tribes' other contentions.

The first alternative claim raised against the validity of the tax by the Tribes is that it is violative of the Indian Commerce Clause because it imposes a multiple tax burden on Indian commerce which is not shared by non-Indian commerce.[16] In order to establish this proposition, the Tribes rely by analogy on decisions of the Supreme Court construing the scope and effect of the Commerce Clause as it has been applied to interstate as opposed to Indian commerce. The Tribes argue that the rationale of such cases is applicable since "[i]t is no more permissible for a state to discriminate against Indian commerce than it is to discriminate against interstate commerce."

A full review of these contentions is, however, unnecessary. The simple answer is that such claims have been prohibited by the Supreme Court. The cases on which the Tribes rely for support have established a doctrine of "contitutional law" based upon a consideration of the scope and effect of the Commerce Clause in the absence of controlling federal statutes. *E.g., Freeman v. Hewit*, 329 U.S. 249, 252 (1946); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 769-70 (1945); *Gwin, White & Prince v. Henneford*,

16. This Court is mindful of the Ninth Circuit's recent decision in *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). In *Fort Mojave*, both the county government and the tribe imposed a tax on the non-Indian lessee of Indian property on the reservation. Nevertheless, without citation of authority, the Court held that there was no impermissible double taxation because the taxes were "imposed by two different and distinct taxing authorities." *Id.* at 1258. This, of course, does not resolve the issue but merely restates the question. In every case in which the Supreme Court has struck down state taxes as being violative of the Commerce Clause due to double taxation, more than one taxing authority has been actually or potentially involved. However, in view of our disposition of this issue, there is no need to consider whether this Court, as a three-judge District Court, is bound by the law of the Circuit in which it sits. *Compare Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 504-05 (W.D. Wash. 1967), *aff'd.* 390 U.S. 598 (1968), with *Athanson v. Grasso*, 411 F. Supp. 1153, 1157 (D. Conn. 1976), and *Alabama NAACP State Conference of Branches v. Wallace*, 269 F. Supp. 346, 350 (M.D. Ala. 1967).

305 U.S. 434, 438 (1939). *See Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359 (1941); *Henneford v. Silas Mason Co.*, 300 U.S. 577 (1937); *Monamotor Oil Co. v. Johnson*, 292 U.S. 86 (1934).

In *Moe*, 425 U.S. at 481 n.17, the Court made it clear that after *Mescalero* and *McClanahan*, state tax statutes which affect Indian tribes and Indians will not be invalidated as a result of "any automatic exemptions 'as a matter of constitutional law' either under the Commerce Clause or the intergovernmental-immunity doctrine . . . ." It is true nevertheless that the Court has established the general rule that a state may not tax Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation absent congressional consent, *Mescalero* and *McClanahan*.[17] Outside the "special area of state taxation"[18] the Tribes have the burden of establishing that a challenged state regulation "frustrates tribal self-government, *see Williams v. Lee*, 358 U.S. 217, 219-220 (1959), or runs afoul of any congressional enactment dealing with the affairs of reservation Indians, *United States v. McGowan*, 302 U.S. 535, 539 (1938) . . . ." *Moe*, 425 U.S. at 483.

The State implements its cigarette tax by imposing the burden of collecting it upon the Dealers. The Tribes, continuing their reliance on the analogy to cases interpreting the Interstate Commerce Clause, urge that the imposition of the collection requirement upon the Dealers is violative of the Due Process Clause.[19]

The short answer to these contentions is that the Supreme Court expressly approved such a collection requirement in *Moe*.

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17. Even this general rule was established as the result of the conclusion that state taxation was preempted after considering the relevant federal treaties and statutes rather than as an automatic rule of constitutional law based upon the construction of a particular section of the Constitution.

18. Since the legal incidence tax involved here falls upon the non-Indian purchaser of cigarettes rather than the Tribes, this case falls outside the special area of state taxation to which the aforementioned general rule is applicable. *Moe*, 425 U.S. at 483.

19. In asserting this claim, the Tribes neither attack the validity of the tax nor do they rely directly on the unadorned force of the Commerce Clause itself. Accordingly consideration of this claim is not prohibited by the language in note 17 of *Moe*.

> "We therefore agree with the District Court that to the extent that the 'smoke shops' sell to those upon whom the State has validly imposed a sales or excise tax with respect to the article sold, the State may require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection and enforcement thereof." 425 U.S. at 483.

We are unpersuaded by the Tribes' effort to distinguish *Moe* in this regard by claiming that unlike in *Moe*, there is here an absence of the required nexus between Dealer, upon whom the collection requirement is imposed, and the taxing jurisdiction. They suggest that the nexus in *Moe* was supplied by the Indian retailer's purchase of his cigarette inventory from a Montana wholesaler. In contrast, they point out that here the Dealers neither purchase their inventories from an in-state wholesaler nor do they maintain any offices or send any agent off the reservation to solicit sales. Consequently, they argue there is no nexus with the State sufficient to support a collection requirement.

In interstate commerce cases, it has long been recognized that "[s]tates necessarily impose the burden of collecting the [use] tax on the out-of-state seller; the impracticability of its collection from the multitude of individual purchasers is obvious. . . . However, not every out-of-state seller may constitutionally be made liable for payment of the use tax on merchandise sold to purchasers in the State." *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977). Principles of due process require that in order for a collection requirement to be valid, the out-of-state seller must have some nexus to the taxing state; the "simple but controlling question is whether the state has given anything for which it can ask return." *Wisconsin v. J. C. Penney Co.*, 311 435, 444 (1940).

This test is satisfied if the person on whom the collection duty is imposed has "some definite link" or "minimum connection" with the taxing jurisdiction. *National Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753, 756 (1967); *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954). This link is sufficient if the seller receives any services from the taxing state, and it is irrelevant that the services

received are unrelated to the activity of the seller which gave rise to the collection duty. *National Geographic,* 430 U.S. at 560-61.

Thus, it is apparent that the Tribes read *Moe* much too narrowly. In *Moe,* the Court neither mentioned the nexus requirement nor did it give any special significance to the fact that the Indian retailer secured his inventory from an in-state wholesaler. This was undoubtedly because of the substantial presence of the Indian retailer in the state. After all, the reservation exists within the territorial boundaries of State. Indians are citizens of the State and are entitled to and do receive services from it. Although this is not sufficient to justify direct state taxation of Indians or Indian tribes in the face of conflicting treaties and/or federal statutes, it clearly constitutes a sufficient link so that the mere imposition of a collection requirement does not violate due process.

The Tribes next argue that the State's cigarette tax has been preempted by the Indian Traders Act, 25 U.S.C. § 261, *et. seq.;* by federal policy underlying the Indian Reorganization Act of 1934, 25 U.S.C. § 476, *et seq.,* Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450, *et seq.,* and the Indian Financing Act of 1974, 25 U.S.C. § 1451, *et seq.;* and, finally, by tribal ordinances establishing a comprehensive regulatory and taxing scheme for transactions involving on-reservation sales by Indian retailers to Indians and non-Indians.

It is well established that when Congress passes legislation in implementation of one of its enumerated powers, it may be so pervasive as to preclude any state regulation in the same field. *Warren; Hines v. Davidowitz,* 312 U.S. 52 (1941). This may be true even though the state regulation is consistent with and merely seems to supplement a less pervasive federal regulatory scheme. *Campbell v. Hussey,* 368 U.S. 297 (1961); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947). One test which has been frequently cited by the Court was first promulgated in *Hines,* 312 U.S. at 67:

> "This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expres-

> sions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. . . . In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether [a challenged statute] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

The preemptive scope of Indian Traders Act was first considered by the Supreme Court in *Warren* wherein an Arizona statute which imposed a tax upon the income of a federally licensed Indian trader derived from the on-reservation sale of goods to Indians was struck down. Noting the long history of comprehensive federal regulation of Indian traders, the Court found

> "the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Act of Congress or by valid regulations promulgated under those Acts." 380 U.S. at 691.

Consistent with the principles of federal preemption, the Court struck down the tax. To do otherwise, would have

> "put financial burdens on [the trader] or the Indians with whom it deals in addition to those Congress or the tribes have prescribed, and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." *Id.*

More recently the Court had occasion to mark the limit of the preemptive scope of the Indian Traders Act. The congressional objective of insulating Indian traders from state regulation in their dealings with Indians was emphasized in *Moe* as the Court, distinguishing *Warren*, rejected an argument similar to that made by the Tribes here. The fact that Montana placed its cigarette tax on the non-Indian consumer rather than the Indian trader as in *Warren* was held to impose no burden on the trader sufficient to trigger preemption by the Indian Traders Act.

Moe, however, does not dispose of the Tribes' further argument that *Warren* requires the conclusion that the

reporting aspects of State's collection requirement have been preempted. In *Moe*, although the Court approved the requirement that the Indian trader add the tax to the sales price, it expressly reserved judgment on whether the state could lawfully impose additional burdens on the trader. 425 U.S. at 468 n.6.

To the extent a limited collection burden was approved by the Court in *Moe*, it related to the trader's transactions with non-Indians rather than Indians. Thus, the Court's holding in *Warren* that the Indian Traders Act left no room for state regulations burdening Indian traders as a result of their on-reservation transactions with Indians was left intact.

In this case, the requirements imposed by the State, as set forth in E.T.B. 504.08.192, go beyond requiring the trader to collect the tax on sales to non-Indians. Although recognizing that sales to Indians may not be made subject to the tax, the State requires the Dealers to "demonstrate entitlement to make such sales without collection of tax" by keeping detailed records of sales to Indians. Dealers are required to record and retain for state inspection the names of all Indian purchasers, their tribal affiliations, the Indian reservations to which or within which sales are made, and the dollar amounts and dates of the sales. In addition, unless the Indian purchaser is personally known to the Dealer, he must require presentment of a tribal identification card issued by the member's tribe. This constitutes a burden on the Dealer which relates to his transactions with Indians. Further, State makes no provision for compensating him for the burden imposed. Even if his sales to non-Indians declined or were purposely discontinued, the burden would continue undiminished. In fact, the only way a Dealer could avoid the record keeping requirement would be to cease doing business with Indians as well as with non-Indians. Since State has pointed to no "Acts of Congress or valid regulations promulgated under those Acts" (*Warren*, 380 U.S. at 691) which authorize such, the record keeping requirements are invalid.

The Tribes next urge that even if the Court finds that the State's cigarette tax has not been preempted by the Indian Traders Act, it has been preempted by "well established

federal policy . . . encouraging Indian self-government and economic development" underlying the Indian Reorganization Act, Indian Self-Determination Act, and the Indian Financing Act. We disagree.

The statutes relied upon by the Tribes do establish a general federal policy favoring Indian self-government and economic development. The Indian Reorganization Act, for example, was passed by Congress to encourage tribes to revitalize their self-government by adopting constitutions and bylaws and creating chartered corporations, with power to conduct business and economic affairs. *Mescalero,* 411 U.S. at 151. In *Bryan,* 426 U.S. 389 n.14, the Supreme Court, citing the Indian Self-Determination Act and the Indian Financing Act, noted that federal policy was "returning to a focus upon strengthening tribal self-government." *See also Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 663 (9th Cir. 1975). However, the Supreme Court has never suggested that any of these statutes has of its own force established a policy of implied tax immunity for Indian tribes or those dealing with Indian tribes. In fact, in *Mescalero* the Court held that the Indian Reorganization Act did not create a tax immunity for income earned by a tribally run corporation from its off-reservation activities.

Notwithstanding the existence of such a general federal policy, a review of the cases cited by the Tribes and uncovered by our own research reveals that in order to determine whether state legislation "stands as an obstacle to the accomplishment" of some federal purpose, it must be compared to a federal enactment on the same subject. That is, the threshold test is whether the state and federal governments have attempted to regulate the same subject matter. *See, e.g., City of Burbank v. Lockheed Air Terminal,* 411 U.S. 624 (1973), (regulation of airport noise levels); *Florida Lime & Avocado Growers* (maturity of avocados for marketing); *Campbell* (labeling of tobacco for marketing); *Castle v. Hayes Freight Lines,* 348 U.S. 61 (1954); (licensing of common carrier); *California v. Zook,* 336 U.S. 725 (1949), (sale or arrangement of transportation on a public highway; *Rice* (regulation of rates charged by warehouse operators); *Cloverleaf Butter Co. v.*

Patterson, 315 U.S. 148 (1942), (production standards for renovated butter); and *Hines* (registration of aliens as a distinct group).

The difficulty for the Tribes is that they can point to no provision in any of the cited Acts which attempts to implement the federal policy favoring Indian self-government and economic development by regulating subject matter closely related to that touched on by the State's cigarette tax. The necessity of such a showing to establish preemption is further buttressed by the Supreme Court's analysis in *Fisher v. District Court*, 424 U.S. 382 (1976). In *Fisher*, the Court held that a Montana statute regulating adoption of Indian children on the Northern Cheyenne Indian Reservation was preempted by the passage of a tribal ordinance covering the same subject matter. While the Court expressly acknowledged the federal policy underlying the passage of the Indian Reorganization Act, it did not rely on the force of that general policy standing alone to invalidate the statute. Rather, the decision that the state statute had been preempted turned on the implementation of the underlying federal policy through the passage of the tribal adoption ordinance.

> "In 1935, the [Northern Cheyenne] Tribe adopted a constitution and bylaws pursuant to § 16 of the Indian Reorganization Act, . . . a statute specifically designed to encourage Indian tribes to revitalize their self-government. *Mescalero Apache Tribe, supra*, at 151. Acting pursuant to the constitution and bylaws, the Tribal Council . . . established the Tribal Court and granted it jurisdiction over adoptions . . . ." *Id.* at 387.
>
> "The tribal ordinance conferring jurisdiction on the Tribal Court was authorized by § 16 of the Indian Reorganization Act, 25 U.S.C. § 476. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, . . . that jurisdiction has now been pre-empted." *Id.* at 390.

Thus, absent some legislation touching upon the subject matter regulated by the State, the federal policy underlying the Acts relied on by the Tribes does not preempt the State's cigarette taxing scheme.

We now come to the Tribes' contention that the State's scheme has been preempted by the passage of tribal cigarette ordinances.

It is clear that Congress may validly delegate legislative authority to an Indian tribe even if the exercise of that authority involves control over the conduct of non-Indians. *United States v. Mazurie,* 419 U.S. 544 (1975). In addition, it is clear that where an Indian tribe exercises delegated authority in the implementation of federal policy and the result is a tribal ordinance which conflicts with an otherwise valid state statute, the state statute is preempted. *Fisher.* Although *Fisher* involved a statute which affected only Indians, there is no reason to believe that preemption would be precluded merely because the state and tribal enactments also affected non-Indians on tribal lands and as much has been recognized by other federal courts. In *Confederated Tribes of the Colville Indian Reservation v. Washington,* 412 F. Supp. 651 (E.D. Wash. 1976), the District Court held that a state statute requiring non-Indians to purchase state fishing licenses prior to fishing on the Colville Indian Reservation was preempted by the enactment of a tribal ordinance, pursuant to federally delegated power, which established "a comprehensive program for the administration of tribal fisheries resources" and which, in part, required non-Indians to purchase fishing licenses from the tribe. To the same effect is *Eastern Band of Cherokee Indians v. North Carolina,* No. BC-C-76-65 (W.D. N.C. August 27, 1976).[20]

The questions remain then whether there has been a delegation of legislative authority to the Tribes and, if so, whether there has been a preemption.

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20. *People of State of California v. Quechan Tribe of Indians,* 424 F. Supp. 969 (S.D. Cal. 1977), is not to the contrary. It is true that the Court in *Quechan Tribe of Indians* rejected an argument that the mere existence of a tribal ordinance requiring non-Indians to purchase tribal fishing licenses preempted a state statute regulating on-reservation hunting and fishing by non-Indians. However, there was no indication the tribal ordinance established a comprehensive scheme regulating on-reservation hunting and fishing. Moreover, there was no interference with the objectives of the tribal ordinance since the Court found that notwithstanding the state regulation, "[t]he same revenues as have been historically available to the Tribe from the sale of permits will continue to be available if California is allowed to apply its fish and game laws." *Id.* at 976.

In 1936, the Makah Tribe adopted a constitution and bylaws pursuant to the Indian Reorganization Act, and the passage of its cigarette ordinance was an exercise of governmental power authorized by § 16 of the Act, 25 U.S.C. § 476. This clearly constitutes the exercise of congressionally delegated power. *Fisher.*

The Colville and Lummi Tribes, however, voted in 1935 not to come under the Indian Reorganization Act. Nevertheless we conclude they were exercising congressionally delegated power in passing their cigarette ordinances. Their constitution and bylaws were ratified by a majority of the members, approved by the Secretary of Interior and any amendment is subject to the provisions of 25 C.F.R. 53.1—the same conditions which are imposed on tribes organizing under the Indian Reorganization Act. Federal programs designed to encourage tribal self-government and economic development are uniformly made available to all federally recognized tribes, not just those which are organized under the Indian Reorganization Act. See, *e.g.*, § 3 of the Indian Financing Act, 25 U.S.C. § 1452, and § 4 of the Indian Self Determination Act, 25 U.S.C. § 450(b).

Of primary significance is the fact that the governmental powers delegated under § 16 of the Indian Reorganization Act were in large part those "powers vested in any Indian tribe or tribal council by existing law." The power to tax both Indians and non-Indians was one of those powers. *Iron Crow v. Oglala Sioux Tribe,* 231 F.2d 89 (8th Cir. 1956). See Cohen, Handbook of Federal Indian Law at 142 (1942). Under these circumstances, particularly when it is recalled that notwithstanding their treaty rights, tribal governments are subject to the plenary power of Congress and so retain only those powers which Congress allows them to retain (*Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903)), it is accurate to describe the Tribes as exercising congressionally delegated power.

Once it has been determined that the Tribes in passing their cigarette ordinances were exercising federally delegated power, it is clear that the application of the State's cigarette tax to non-Indians purchasing cigarettes from Indian retailers on the reservation has been preempted. There is no question but that the tribal taxing ordinances

regulate the same subject matter as does the state taxing statute. It is equally clear that the State's statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

As the nature and scope of the tribal regulatory and and taxing scheme has been outlined above, it is necessary only to observe that the Tribes established their cigarette ordinances to accomplish two primary objectives: the regulation of conditions under which cigarettes could be sold to Indians and non-Indians on the reservation, and to generate revenue for essential tribal governmental programs. The revenue generated by the taxes to date has been devoted to the partial funding of programs such as day care, education, nutrition, fire protection and alcoholism of reservation people. The bulk of the revenue derived from the tribal taxes comes from sales to non-Indians. The impact of imposing the State's cigarette tax in addition to the tribal tax will not only eliminate the Tribes' competitive advantage but it will give off-reservation retailers a substantial price advantage. Thus, it is not hard to understand why the State conceded that:

> "Assuming that the court finds that the State could require the Tribe and/or its licensed retailers to add the State tax to the sale price of cigarettes sold to non-Indians, *it is painfully apparent that very few, if any, cartons of cigarettes would have been sold.*" (Emphasis added.)

Under such circumstances, the objectives of Congress in making the delegation of power and of the Tribes in passing the taxation ordinances for tribal usage would obviously be frustrated. Therefore, the application of the State's tax has been preempted.

In its brief and at final argument, the State urged that to find its cigarette tax invalid would wreak financial disaster upon it as the Tribes would be free to create unlimited tax havens for non-Indians on their reservations. This scenario is unlikely to occur for several reasons. First, there is no preemption absent tribal taxation, and to the extent the Tribes impose their tax, there is no tax haven.

Second, to the extent the Tribes are able to generate revenue for needed services, the corresponding burden on the State to supply services may be reduced. Third, the evidence indicates that the Tribes have shown considerable self-restraint in this area and there is no reason to assume they will not continue to do so. For example, there is no evidence that the Tribes have sought to tax non-Indians and thus preempt the State's power to tax in any area other than the sale of cigarettes. Even with regard to the sale of cigarettes, each of the Tribes currently limits sales to non-Indians by its Dealers to three cartons per sale. Accordingly, non-Indians must continue to buy the bulk of their cigarettes from non-Indian retailers and those sales are subject to the State's taxes. Fourth, all ordinances are subject to the approval of the Secretary of Interior and he could be expected to act in the event of abuse. Fifth, and of singular importance is the plenary power of Congress. It could act at any time to limit or remove any of the legislative powers of the tribal governments.

As an alternate ground for relief, we hold that as applied to non-Indians as a result of their on-reservation purchases from Dealers, the State's cigarette taxing scheme constitutes an interference with tribal self-government.

In *Williams v. Lee*, 358 U.S. 217 (1959), the Supreme Court considered whether a non-Indian could sue an Indian in state court on a debt arising from a transaction on the reservations. *Williams* teaches that "[e]ssentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. Noting that the tribal court had broad civil jurisdiction which covered civil actions against Indians by outsiders, the Court held the state court to be without jurisdiction.

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223.

The continuing validity of the *Williams* self-government test has been assured by the Supreme Court. *McClanahan*, and *Fisher*.

In this case, both the State and the Tribes seek to tax non-Indians as a result of their on-reservation transactions with Dealers. The impact of superimposing the State's cigarette tax on the tribal taxes has already been discussed in this opinion. However, it bears repeating that at least with regard to a commodity as highly price elastic as cigarettes, the result will be the depletion of an already limited tribal tax base, probable destruction of the tribal enterprises and elimination of essential revenues needed for tribally sponsored programs.

While not really contesting the probable detriment to the Tribes, the State argues that since it imposes its tax on the non-Indian consumer, the economic impact on the Tribes is indirect and that no matter how deleterious such an impact is, it cannot be deemed an interference with tribal self-government. While this argument is not without force, we find it unpersuasive. The foundation of the State's contention is to be found in its statement that the Tribe's self-government claim "in reality boils down to a claim of intergovernmental immunity." Based on this analysis, they rely heavily on the line of cases beginning with *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938), which establishes the proposition that those dealing with the federal government are not free from state taxation merely because the economic impact of the state tax may be passed on to the federal government. (The same analysis, of course, applies where the federal government seeks to tax those who deal with state governments).

Prior to *Mountain Producers*, with limited exceptions such as *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), court decisions had marked a course of ever widening tax immunity for those dealing with state or federal governments under application of the doctrine of intergovernmental tax immunity. However, that course was reversed in *Mountain Producers. Oklahoma Tax Comm'n v. Texas Co.*, 336 U.S. 342, 364-65 (1949). The trend toward limiting the reach of intergovernmental immunity was continued in cases such as *King & Boozer, Oklahoma*

Tax Comm'n; and *United States v. City of Detroit,* 355 U.S. 466 (1958).

In *Mountain Producers,* the Supreme Court declared the principle

> "that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality *and there is only remote, if any, influence upon the exercise of the functions of government.' Willcuts v. Bunn,* 282 U.S. 216, 225, and illustrations there cited." 303 U.S. at 385. (Emphasis added).

The Court was led to the declaration of this guiding principle because courts had been granting broad private tax exemptions based on " 'merely theoretical conceptions of interference with the functions of government' " which were "unjustified by actual interfering or destructive effects upon the performance of obligations to or work for the government, state or national." *Oklahoma Tax Comm'n,* 336 U.S. at 363-64. Examples of this problem were cited by the Court. *Id.* at 363 n.36.

This Court recognizes and the Tribes concede that any application of the doctrine of intergovernmental tax immunity to Indian Tribes was severely limited in *Mescalero. See also Moe,* 425 U.S. at 481 n.17. However, it is equally clear that the limitation on state power established in *Williams* continues unabated. Nevertheless it would be a mistake for the courts to set the same course in applying the *Williams* tribal self-government test as that which prompted the Supreme Court's decision in *Mountain Producers* with respect to the intergovernmental immunity doctrine. This does not mean as the State contends that any state regulation of non-Indians as a result of their on-reservation transactions with Indians will, in the absence of a controlling federal statute, be valid if it results only in an indirect impact on a tribe. Rather, what the courts must avoid is utilizing the *Williams* test to strike down such state regulation based on "merely theoretical conceptions of interference with the functions of [tribal]

government." In other words, if a tribe has proved and/or a state concedes that the state regulation causes an actual interference with the performance of the governmental obligations, the courts must, consistent with *Williams*, strike the regulation down.

It is our belief that it was this type of reasoning which the Supreme Court had in mind when in clarifying the *Williams* test, Justice Marshall, writing for the Court in *McClanahan*, stated that the *Williams* test has been applied "principally [to] situations involving non-Indians. . . . In these situations, both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected." *Id.* at 179.

When viewed with the above principle in mind, our conclusion in this case that the State's tax must be struck down as interfering with tribal self-government is not inconsistent with the Supreme Court's decision in *Moe* or those of the Ninth Circuit in *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977); and *Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971, *cert. denied*, 405 U.S. 933 (1972). In *Moe*, the cigarettes at issue were sold by individual Indians operating businesses and not by tribal enterprises. There was no indication that the sales of cigarettes were tribally financed, managed or regulated. Although the tribe apparently charged an administrative fee, no tribal tax was imposed on the cigarettes sold in the smoke shops, and the tribe itself received no direct benefits from the cigarette sales upon which it depended as a source of revenue for tribal programs. Thus, in the absence of any direct involvement by the tribe, the Court concluded there was no interference with tribal self-government.

In *Agua Caliente*, the Court of Appeals upheld the imposition of the California Possessory Interest Tax on non-Indian lessees of Indian land. Although the Court granted relief on principles of intergovernmental immunity as applied in *United States v. City of Detroit* rather than the

Williams test, the result is still largely explainable on the same basis as is *Moe*. The land involved consisted of 1,250 acres which had been leased to non-Indians with the approval of the Secretary of Interior. All but eight acres (99.3%) were leased by individual Indian allottees without tribal involvement. Therefore, as in *Moe*, absent tribal involvement, an indirect economic impact on individual Indians was not sufficient to constitute an interference with tribal self-government. There was, however, tribal involvement with the remaining eight acres (0.7%) as to which the possessory interest tax was also upheld. However, the opinion gives no indication that the economic impact of the possessory interest tax would have destroyed the leasehold value of the tribe's land or that any reduction in income to the tribe as a result of the state's tax would have deprived the tribe of revenues essential for its governmental programs. In addition, there was no comprehensive tribal regulatory and taxing scheme which would have been thwarted.

In *Fort Mojave*, the Court of Appeals reaffirmed the result in *Agua Caliente* while applying the *Williams* test on facts which were superficially similar to those in this case. The Court upheld the imposition of a possessory interest tax on non-Indian lessees of Indian land in spite of the fact that the tribe had also imposed its own tax on the lessees. However, a crucial factual difference between *Fort Mojave* and the instant case is that in *Fort Mojave* the Court was unable to determine the degree to which, if any, the economic burden of the state's tax would have fallen on the tribe. On such facts, the Court was compelled to "hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government." 543 F.2d at 1258. To have done otherwise would have been to disregard the Supreme Court's admonitions that a state's taxing power should not be restricted on " 'merely theoretical conceptions of interference with the functions of government.' " *Oklahoma Tax Comm'n*, 336 U.S. at 363. In contrast, a restriction of the State's taxing power in this case is justified by proof of an actual interference with, if not destruction of, the Tribes' ability to carry out their tax financed self-governing func-

tions. Therefore, we reject the State's contention that *Fort Mojave* controls the result here.[21]

(2) *Motor Vehicle, Mobile Home, Camper and Travel Trailer Excise Taxes:*

In addition to their attacks on the State's cigarette taxing scheme, the Tribes contest the application of the State's excise taxation of motor vehicles, R.C.W. 82.44, and mobile homes, camper and travel trailers, R.C.W. 82.50, owned by the Tribes or their enrolled members.[22] Although the motor vehicle and mobile home, camper and travel trailer taxes differ slightly, the State acknowledges they are "in practical operation and effect virtually the same." Each tax is denominated under the applicable statute as an excise tax imposed and assessed annually upon a specified percentage of the fair market value of the vehicle for the privilege of using the vehicle within the state of Washington.

The issue presented has been narrowed by the State's concession that after *McClanahan, Moe,* and *Bryan,* it may not tax mobile homes or vehicles owned by the Tribes or their members which are used exclusively on the reservations. Counsel for the State further assures the Court that it has not only ceased to impose taxes in such situations, but stands ready, willing and able to make refunds on proof of entitlement for such taxes previously imposed.

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21. In view of our conclusion that the State's cigarette taxing scheme may not be validly applied to sales to non-Indians under the circumstances here at present, any steps taken by the State to enforce the tax were also unlawful. Hence, it is not necessary and we do not reach the merits of the Tribes' additional claim that the enforcement measures undertaken by the State are violative of federal law and/or the Constitution of the United States independently of whether the tax itself is valid. For the same reason, it is not necessary and we do not reach the merits of the Tribes' claim that even if the tax may be applied to non-Indians who, though living on the reservation, were not enrolled members of the respective Tribes. However, the latter issue was resolved adversely to the State in No. 3909.

22. The State argues that 28 U.S.C. § 1341 bars this Court from considering these claims to the extent they are asserted on behalf of individual members of the Tribes. After *Moe,* it is clear that an Indian tribe has standing to assert the claims of its members with respect to the validity of state tax laws and that § 1341 does not bar the assertion of such claims by a tribe.

However, the State, relying on *Mescalero*, contends that *McClanahan* and *Moe* are not controlling to the extent the challenged taxes are imposed for off-reservation use. Under the existing scheme, off-reservation use is presumed (except, apparently, as to mobile homes), and since the amount of tax payable is the same regardless of the extent of vehicle use, the State requires payment of the tax as a condition precedent to the licensing of the vehicle.

Although there is no doubt that *Mescalero* would control if this issue involved use exclusively off the reservation, we do not agree that *Moe* is not controlling on the facts presented here. A review of the District Court's decision in *Moe* reveals that the vehicle use there taxed was use partly on and partly off the Flathead Reservation. *Confederated Salish & Kootenai Tribes v. Montana*, 392 F. Supp. 1325, 1328-29 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976), (Smith, J., concurring and dissenting). Moreover, the Montana tax invalidated in *Moe* was, except for labeling, identical in operation and effect to the tax here imposed.

Rather than disputing the practical similarity between the tax invalidated in *Moe* and that imposed here, the State seeks to distinguish *Moe* on the ground that the tax imposed by Montana was denominated a "personal property tax" while the State's is labeled an "excise" or privilege tax. To be sure, the Supreme Court, at least in governmental immunity cases, has sometimes placed great store in the conceptual differences between property and use or privilege taxes. *E.g., United States v. City of Detroit*. Nevertheless the Supreme Court has also expressed its willingness to disregard labels in order to save a "property tax" if the tax was otherwise valid when viewed solely with regard to its "practical operation." *E.g., City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958), and cases cited. *Cf. Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Since the Court eschewed this approach in *Moe*, we can only conclude that it found the tax improper in its practical operation. Inasmuch as there is no difference in practical operation between the two schemes, we hold that the State's motor vehicle and mobile home, camper and travel trailer excise taxes are invalid as applied to reservation situs vehicles which are owned by the Tribes and/or their

reservation resident members even though they are used, in part, off the reservation.

(3) *The State's Assumption of Indian Reservation Jurisdiction:*

The Tribes challenge the State's assumption of Indian jurisdiction pursuant to R.C.W. 37.12 as being violative of federal law and the Constitution of the United States. First, they argue that it violates the terms of congressional consent contained in Pub. L. No. 280 because the State was required and failed to remove a disclaimer of Indian jurisdiction in its constitution, and because partial assumptions of jurisdiction were prohibited. This claim is without merit. The disclaimer issue was presented to the Supreme Court on appeal from an adverse decision in *Makah Indian Tribe v. State*, 76 Wash. 2d 485, 457 P.2d 590 (1969), *appeal dismissed*, 397 U.S. 316 (1970). The Supreme Court's dismissal of the appeal as not presenting a substantial federal question is binding on this Court. *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). And it is now also settled that Pub. L. No. 280 does not prohibit partial assumptions of jurisdiction. *Yakima 1*.

Second, the Tribes urge that partial assumption within reservations violates the Equal Protection Clause of the Fourteenth Amendment. In *Yakima 2*, the Court of Appeals held that the State's assumption of partial territorial jurisdiction over the Yakima Reservation pursuant to R.C.W. 37.12.010 violated the Equal Protection Clause because the distinctions in the statute between trust and nontrust land bore no rational relationship to the statute's purpose of providing law enforcement on the reservation. The entire section of the statute was struck down because the Court found the objectionable portions could not be severed from the remainder. This decision is dispositive of the claims of the Makah and Lummi Tribes because the pattern of jurisdiction on their reservations is based on R.C.W. 37.12.010 and is identical to that on the Yakima Reservation.

However, the pattern of jurisdiction asserted over the Colville Reservation differs from that asserted over the Makah and Lummi Reservations. Acting pursuant to R.

C.W. 37.12.021 which expressly requires the consent of the Tribe, the State assumed "total" jurisdiction over the Colville Reservation. It is argued that such action constitutes a denial of equal protection because the abuses inherent in the partial assumption of jurisdiction within a reservation are also present where a state accepts total jurisdiction over some but not all reservations. A review of the discussions in *Yakima 1 and 2* establishes that this argument is without merit.

Alternatively, it is argued that R.C.W. 37.12.021 must be struck down because it is not severable from R.C.W. 37.12.010. This claim is also without merit. Basically, the remaining provisions of an Act may stand in spite of the unconstitutionality of another portion absent some indication that the legislature would have not enacted them alone and if the remaining provisions can operate independently of the unconstitutional portion. *United States v. Jackson*, 390 U.S. 570, 585 (1968); *State v. Anderson*, 81 Wash. 2d 234, 236 (1972), 501 P.2d 184, 185-86 (1972). In *Yakima 2*, the Court of Appeals found that the invalidation of one aspect of partial jurisdiction would have complicated the enforcement of other aspects. Thus, the Court held the remaining provisions not to be severable and struck R.C.W. 37.12.010 down in its entirety. However, the inability of the State to enforce the partial jurisdiction of R.C.W. 37.-12.010 as to nonconsenting tribes in no way inhibits its ability to enforce the full jurisdiction assumed as to consenting tribes under R.C.W. 37.12.021. Further, there is no substantial reason to assume that the legislature would have refused to enact legislation obligating it to assume full jurisdiction over consenting tribes merely because it was unable to constitutionally assert partial jurisdiction over tribes withholding their consent to full jurisdiction.

We finally conclude that judicial economy, convenience, and fairness demand that we retain jurisdiction of the Supremacy Clause issues presented by the Tribes for final adjudication and declare:

(1) The imposition of the State's cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against any of the Tribes or their re-

spective retail dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government;

(2) The imposition of the State's tobacco products taxing scheme under R.C.W. 82.26, the regulations promulgated thereunder, if any, and any enforcement thereof as against any of the Tribes or their respective retail dealers are unlawful in that the legal incidence of the tax falls upon the Tribes or their respective retail dealers and results in a direct taxation of Indian income derived from on-reservation activities;

(3) The imposition of the State's motor vehicle excise tax under R.C.W. 82.44 and its mobile home, camper, and trailer excise tax under R.C.W. 82.50, the regulations promulgated thereunder, and any enforcement thereof as against any of the Tribes or reservation resident members are unlawful as an infringement of their rights secured under federal statutes and treaties; and

(4) The State's exercise of civil and criminal jurisdiction under R.C.W. 37.12, the regulations promulgated thereunder, and any enforcement thereof against the Lummi or Makah Tribes or any reservation resident members of either Tribe are unlawful as a denial of Equal Protection under the United States Constitution. However, exercise of similar jurisdiction over the Colville Tribe or any of its reservation resident members does not constitute a violation of the Equal Protection Clause.

Further, we conclude that the Tribes and their respective reservation resident members are entitled to permanent injunctive relief in enforcement of such declarations.

Neither party shall recover costs or attorney fees in these three-judge District Court proceedings.

We deem it expedient and in conservation of judicial time and effort that the issue of the Tribes' recovery of damages, costs and attorney fees therein, if any, resulting from such Supremacy Clause and Fourteenth Amendment infringements should be remanded to the single judge District Court for disposition under further order.

The temporary injunctive relief in favor of the Tribes heretofore issued herein is to remain in force and effect until entry of final judgment herein by this Court.

This decision shall constitute the findings of fact and conclusions of law of this three-judge District Court as required by Fed. R. Civ. P. 52(a).

Counsel for the Tribes is requested to serve and submit within 30 days from the date hereof a proposed final declaratory judgment and decree of permanent restraint in accordance with the foregoing decision.

CAUSE NO. 3909

PARTIES:

The plaintiff is the United States of America for the benefit of the Confederated Tribes and Bands of the Yakima Indian Nation, and the members thereof (Tribe).

The Confederated Tribes and Bands of the Yakima Indian Nation (also Tribe) intervened as plaintiff under Fed. R. Civ. P. 24.[1]

The defendant is State of Washington (State).

JURISDICTION:

We note jurisdiction of these causes pursuant to 28 U.S.C. § 1345, 28 U.S.C. § 1362, 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 2281.[2]

HISTORY OF PROCEEDINGS:

This action was commenced by the filing of the complaint on July 18, 1973, and thereafter the Tribe's motion to intervene was granted. In all other major respects the procedural history parallels that in No. 3868.

THE TRIBE'S CAUSE:

The Tribe seeks declaratory relief with injunctive enforcement from the State's statutes and administrative regulations imposing taxes and collection procedures upon on-reservation sales to nonmembers of the Tribe by tribally licensed retailers (Dealers) of cigarettes (R.C.W. 82.-

1. Neither the Government's nor the Yakima's standing to bring this cause is disputed.

2. See note 1 in No. 3868.

24), tobacco products (R.C.W. 82.26), and general retail sales (R.C.W. 82.08). In addition, the Tribe seeks damages against the State arising out of actions taken to enforce assessments of the challenged cigarette taxes.

STATE'S DEFENSE:

The State joins issue with the Tribe's claims.[3]

FACTS:

A. *Tribe*:

The Tribe is a United States Government recognized sovereign Indian tribe and operates under a governing body approved by the Secretary of Interior. The Yakima Indian Reservation was established by treaty ratified on March 8, 1859, 12 Stat. 951, and encompasses approximately 1,390,000 acres in south central Washington. Of the reservation's population of 27,000, about 6,500 are Indians including 1,500 nonmembers of the Tribe.

B. *State's Taxing Schemes*:

(1) *Cigarette Tax*:

The basic aspects of the State's cigarette excise tax were discussed in No. 3868. Further, as in No. 3868, the Tribe has refused and continues to refuse to seek state authorization to possess unstamped cigarettes or to otherwise comply with the statute and regulations promulgated thereunder. Finally, the State has resorted to seizures of unstamped cigarettes in interstate commerce and bound for the Tribe's reservation to enforce assessments of its cigarette tax.

(2) *Sales Tax*:

The other tax which is also a primary subject of dispute in this cause is the State's retail sales tax (R.C.W. 82.08). Under this enactment, the State asserts the right to tax retail sales of goods (including cigarettes) and services by the Tribe and/or its Dealers to nonmembers of the Tribe.

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3. The State does affirmatively seek relief in the form of a declaratory judgment against the Tribe. The Tribe contends that such a claim is improper in that it is immune from suit. Although the same issue was settled adversely to the State in No. 3868, all of the issues raised by the State herein may be reached by deciding the claims of the Tribe.

C. *Tribe's Business and Taxing Schemes*:

(1) *Cigarettes*:

In essential respects, the Tribe's cigarette and tobacco products retailing and taxation scheme is similar to those adopted by the tribes in No. 3868. The Tribe has passed ordinances providing for the taxation of on-reservation sales of cigarettes and tobacco products by Dealers.[4] These ordinances have been approved by the Secretary of Interior. Pursuant to its ordinances, the Tribe purchases cigarettes from wholesalers outside of Washington which it distributes to tribal members who have been licensed to run seventeen smoke shops on the reservation.

The Tribe derives revenue from the sale of cigarettes in two ways. First, it imposes a "markup" of one cent on each carton sold to its Dealers. A more significant source of revenue is the tax of 22.5 cents on each carton sold by the Dealers. The revenue generated by these sources is substantial; for example, in 1975, the Tribe derived more than $278,000 from them. These monies have been available to partially fund the Tribe's governmental programs for the educational, social, and economic advancement of its members.

As in No. 3868, the competitive advantage enjoyed by the Tribe due to its refusal to impose the State's cigarette tax has resulted in the majority of tribal cigarette sales being made to nonmembers of the Tribe. The stipulations of fact and testimony of Cyril Herrmann[5] establish that superimposing the State's cigarette tax of $1.60 per carton upon tribal sales would have the same impact as it would in No. 3868. That is, the tribal cigarette enterprises would be destroyed, thus eliminating a source of tax revenue

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4. However, in contrast to No. 3868 there is no evidence in this cause that the Dealers are federally licensed Indian Traders.

5. The deposition of Cyril Herrmann was taken by the Tribe and has been admitted into evidence. Herrmann received a Ph.D. in economics from Harvard University in 1953. He taught marketing at the Massachusetts Institute of Technology for six years and is presently Western Regional Vice-President of Arthur C. Little, Inc., a large diversified consulting and research company. Herrmann based his opinions on his education and experience in market analysis and upon the information he obtained from his visitation to and discussions at the Yakima reservation. His qualifications as an expert are not disputed by the State.

upon which the Yakima Tribal Council relies for a substantial amount of its operating capital.

(2) *Other Businesses*:

The Tribe is also engaged in the operation of various noncigarette business enterprises.[6] Although the sales of these businesses are obviously not subject to the State's cigarette excise tax, the State does claim that sales to nonmembers of the Tribe are subject to its retail sales tax. The evidence does not afford a clear picture of what the impact would be of applying the State's retail sales tax to these businesses. The annual sales volume of these businesses is about $2,000,000. However, this figure includes the sales of the timber and land enterprises and those to tribal members which the State does not seek to tax. The stipulations of fact are unenlightening on this point. They merely show that the "sales [of these enterprises] are at economic value and if State excise taxes are paid on these sales it will reduce the income of the Yakima Tribe . . . ." The testimony of Herrmann, the Tribe's economic expert, is equally unavailing. With regard to the Tribe's noncigarette enterprises, he was questioned only as to the furniture manufacturing operation. And even there, his analysis of the impact of imposing the State's retail sales tax upon the furniture business was sketchy and not based on a review of the business records. Thus, it cannot be said with certainty that the Tribe could not offset an increase in costs from the application of the State's retail sales tax by somehow reducing production and/or marketing costs. Furthermore, even if the Tribe was unable to offset such cost increases, it is not clear that the economic viability of the furniture enterprise would be destroyed.

Finally, there is no evidence that the Tribe has adopted any ordinance regulating and taxing the noncigarette business enterprises.

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6. Among the business enterprises owned and operated by the Tribe on the reservation, the sales of which the State claims are properly subject to its sales tax, are furniture, boat and housing unit component manufacturing, Indian arts and crafts, fish and food processing and newspaper distributing. The State does not now assert the authority to similarly tax the sales of the Tribe's land and timber enterprises. The Tribe also owns an aircraft sales, charter and service business which is operated as a corporation off the reservation. The Tribe does not dispute its liability for state taxes applicable to the operation of this business.

DISCUSSION:

The claims presented by the parties in this cause are at the same time more limited and more extensive than those presented in No. 3868. First, the Tribe does not attack the State's assumption of Indian jurisdiction, since they successfully litigated that issue in *Confederated Bands and Tribes of the Yakima Indian Nation v. Washington*, 552 F.2d 1332 (9th Cir. 1977). Neither does the Tribe present any challenge to the State's statutes providing for excise taxes on motor vehicles, campers, travel trailers and mobile homes, nor does it dispute the scope of this three-judge District Court's jurisdiction. Second, the contentions are more extensive in this action since, in addition to challenging the validity of the State's cigarette and tobacco products taxes as applied to on-reservation sales by Dealers to non-members of the Tribe, the Tribe also contests the validity of the State's retail sales tax as applied to the sales of the cigarette and other business enterprises operated by the Tribe on the reservation.

CIGARETTE TAX ISSUES:

Basically, the same arguments are raised both for and against the validity of the State's cigarette and tobacco products excise taxes as were raised in No. 3868. Since there are no essential factual differences between the cases, the resolution of the cigarette and tobacco products tax claims in this cause is susceptible to the same analysis as was applied in No. 3868. We conclude that judicial economy, convenience, and fairness demand that we retain jurisdiction of the Supremacy Clause issues presented by the Tribe for final adjudication and declare, as we did in No. 3868:

(1) The imposition of the State's cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder, and any enforcement thereof by seizure or otherwise against the Tribe or its Dealers are unlawful in that the State's cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government; and

(2) The imposition of the State's tobacco products taxing scheme under R.C.W. 82.26, the regulations promulgated thereunder, if any, and any enforcement thereof

against the Tribe or its Dealers are unlawful in that the legal incidence of the tax falls upon the Tribe or its Dealers and results in a direct taxation of Indian income derived from on-reservation activities.

SALES TAX ISSUES:

Although we were not directly faced with the validity of an application of the State's sales tax to on-reservation tribal sales in No. 3868, the principles of preemption and tribal self-government underlying the resolution of this question were discussed therein. Therefore, only an abbreviated discussion is necessary to explain the basis for our holdings below. In view of the underlying facts, the sales tax question is best discussed in two analytical segments: (A) As it applies to cigarette sales; and (B) As it applies to the on-reservation sales of goods and services of the Tribe's noncigarette businesses.

A. *Application to Cigarette Sales:*

The application of the State's sales tax to tribal cigarette sales would result in a price increase of about two cents per package or roughly twenty cents per carton. Such an increase would, of course, decrease the differential between the price charged by tribal and that charged by nontribal retailers. Since cigarettes are highly price elastic, even a small change in price can cause a significant change in sales. However, even if compelled to add the State's sales tax, Dealers would still be left with a price advantage of approximately eight cents per package or eighty cents per carton.[7] Although we find that the application of the State's sales tax to tribal cigarette sales would cause a decrease in cigarette sales to non-Indians and thereby reduce tribal tax revenues, we cannot find that the decrease would be of sufficient magnitude to destroy cigarette sales as a source of tribal tax revenue and thereby work an actual interference with tribal self-government. Accordingly, we conclude and hold that such an application of the State's sales tax would not adversely affect tribal self-government.

7. Cigarettes sold by Dealers which are not subject to state taxes sell for about $3.95 per carton. The current rate of the State's sales tax is 5.1 percent of the retail sales price. In contrast, cigarettes sold by nontribal retailers to nonmembers of the Tribe sell for about $5.00 per carton. This price reflects $1.60 which is attributable to the State's cigarette excise tax and $0.24 which is attributable to its sales tax.

This conclusion does not end the inquiry since the Tribe also contends that application of the State's sales tax to tribal cigarette sales has been preempted. The tribal ordinance placing a tax upon cigarettes sold by Dealers and the application of the State's sales tax to such cigarette sales clearly touch on the same subject matter. It is equally clear that the Tribe intended in enacting its cigarette taxing ordinance to maximize tribal tax revenue from the sale of cigarettes. Moreover, superimposing the State's sales tax on tribal cigarette sales would substantially decrease the Tribe's cigarette tax revenue. Thus, we find that such an application of the State's sales tax would frustrate the Tribe's objective in passing its ordinance and we hold and declare that the application of the State's sales tax to tribal cigarette sales to non-Indians has been preempted and that any attempted enforcement thereof or regulations promulgated thereunder are unlawful.

B. *Application to Sales Attributable to the Tribe's Other Businesses:*

The Tribe also contends that the State may not apply its sales tax to sales made to non-Indians by the Tribe's noncigarette enterprises. However, this contention must be rejected since the Tribe has failed to carry its burden of proving either that such an application of the State's sales tax has been preempted or that it would interfere with tribal self-government. The absence of any tribal ordinance touching the same subject matter as does the challenged state statute precludes a conclusion that there has been a preemption. The tribal self-government argument must fail because the Tribe did not produce evidence that the application of the State's sales tax would destroy the revenue generating potential of its various businesses. The most that the evidence shows is that there would be some uncertain reduction in income to the Tribe. This is clearly insufficient to establish an interference with tribal self-government. *Fort Mojave Tribe v. County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

Having concluded that the State may properly apply its sales tax to on-reservation noncigarette business transactions involving non-Indians, we are faced with further

disputes as to whom [sic] falls within the category of non-Indians and as to whether the State's sales tax enforcement scheme may be lawfully applied to tribal retailers.

While the State concedes that it may not lawfully apply its sales tax to members of the Tribe, it asserts that it may lawfully tax Indians who are not members of the Tribe. The State has sought to achieve this result by limiting the definition of the term "Indian" in Rule 192 to "persons duly registered on the tribal rolls of the Indian tribe occupying an Indian reservation." Thus, all nonmembers of the Tribe are categorized as non-Indians and deemed subject to taxation. A similar contention was rejected by the District Court in *Confederated Salish & Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1312 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976), and we agree with the view expressed there that all Indians residing on a reservation are equally free from the State's excise taxation regardless of whether they are members of the tribe.[8]

In addition to challenging the validity of the State's sales tax as applied, the Tribe contests the State's enforcement scheme. It argues that the State may not lawfully require the Tribe's noncigarette retailers to register with the Department of Revenue, collect and remit applicable taxes, or to keep records pertaining to taxable and nontaxable transactions.[9] This claim is based on the contention "that

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8. The District Court in *Moe* noted that "different rules may apply 'where Indians have left the reservation and become assimilated into the general community.'" 392 F. Supp. at 1312 n.22 quoting *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973). However, unlike in *Moe*, the State has not asserted that it may tax Indians who reside off the reservation, and we do not reach that question. The definition of "Indian" in Rule 192 makes no distinction between residents and nonresidents of a tribe's reservation. A transaction's susceptibility to taxation is made solely a function of whether the person taxed is an "Indian" and where the sale or delivery of a purchased item occurs. If the buyer is an Indian and the sale or delivery occurs on the reservation, the transaction is deemed nontaxable, whereas if both occur off the reservation, it is deemed taxable.

9. This is one of two so-called "enforcement issues." The other relates to whether the State may lawfully enforce its sales tax by engaging in seizures of Indian property on and/or off the reservation. We do not reach this question because any adjudication of it at the present time would be premature. First, the history of enforcement by seizure relates exclusively

the State has no police power or regulatory power over the Yakima Nation and/or its retailers regarding these on reservation transactions." The Tribe further contends that the Supreme Court's decision in *Moe* is of no assistance in resolving this issue since "none of these burdensome duties were required of the Indian retailer [in *Moe*]."

We do not find that *Moe* is so easily distinguished. There the Supreme Court specifically approved a requirement that the Indian retailer collect and remit to the state the excise tax applicable to on-reservation sales to non-Indians. 425 U.S. at 483. Montana had not attempted to assume civil taxing authority over reservation Indians pursuant to the Act of August 15, 1953, Pub. L. No. 83-280, Ch. 505, 67 Stat. 588-90, 392 F. Supp. at 1306, and it is now clear that any attempt to have done so would have been futile. *Bryan v. Itasca County,* 426 U.S. 373 (1976). Thus, in upholding the collection requirement in *Moe,* the Supreme Court approved the exercise by a state of some regulatory power over reservation Indians if related to their on-reservation transactions with non-Indians. Of course, in the exercise of that power, a state may impose only those burdens which have not been preempted and which do not constitute an interference with tribal self-government. 425 U.S. 483. This rule protects the states' interest in ensuring the collection of taxes validly imposed upon non-Indians while also minimizing the impact on Indians.

When viewed against the above standard, it is clear that the State's collection and registration requirements are valid. The collection requirement imposed pursuant to R.C.W. 82.08.050 requires no more than the simple act specifically approved in *Moe.* The Tribe correctly points out that the Supreme Court did strike down Montana's vendor licensing statute as applied to Indian retailers and

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to the seizure of cigarettes as a means of enforcing the State's cigarette tax which we have held to be invalid. There is no factual development or indication as to whether or, if so, how the State would attempt to enforce its sales tax by seizure. Second, the briefing and argument, both in this cause and No. 3868, were developed exclusively with respect to enforcement of the cigarette tax. Finally, we have no reason to believe the Tribe will not abide by this Court's decision that the State may lawfully impose its sales tax on sales to non-Indians in its noncigarette enterprises. Assuming that to be the case, the State would have no occasion to resort to enforcement by seizure.

contends that a similar result is, therefore, required here.

The statute attacked in *Moe* required the payment of a license fee as a prerequisite in doing business. It, therefore, imposed a tax upon the Indian retailer and could not stand absent congressional consent. *Moe*, 425 U.S. at 475-80. In contrast, the State here imposes only a registration requirement; no fee is imposed upon the Indian retailer. As with the collection requirement "this burden is not, strictly speaking, a tax at all, [and] is not governed by the language of *Mescalero* [*Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973)] dealing with the 'special area of state taxation.'" *Moe*, 425 U.S. at 483. Since the one-time registration requirement is even less burdensome than the collection requirement, it follows that it may be lawfully imposed on Indian retailers doing business with non-Indians.

The Tribe also contests the record keeping requirements which the State has imposed on Dealers with respect to taxable and nontaxable transactions. R.C.W. 82.08.070 requires each seller to make out a monthly return "setting forth the amount of all sales, nontaxable sales, taxable sales, the amount of the tax thereon, and such other information as the department [of Revenue] shall require. . . ." Further, Rule 192 and E.T.B. 504.08.192 require Indian retailers to keep additional specified records solely with respect to nontaxable transactions.

Since the State's power to regulate Indian retailers is no more than an adjunct of its power to tax non-Indians, any exercise of that power would obviously have to be reasonably necessary to ensure payment of taxes imposed on non-Indians, and the State does not contend otherwise. There is, however, no evidence in the record as to whether the record keeping requirements, as promulgated, are or are not reasonably necessary to ensure payment of lawful taxes. In requiring that records be kept which pertain directly to taxable transactions (*e.g.*, the number and dollar volume of sales to non-Indians), the State is merely venturing into an area in which it has recognized, albeit very limited, power. Such regulations are presumed reasonably necessary and the Tribe has failed to carry its burden to prove the contrary.

On the other hand, in requiring that records be kept as to nontaxable sales (*i.e.*, sales to Indians), the State is placing a burden upon Indian retailers with respect to transactions over which it normally would have no power and which pertains only indirectly to taxable sales. Hence, in such situations the State has the burden to prove that the regulation is reasonably necessary to ensure payment of taxes which it does have power to impose. In its brief, the State argues that it is the opinion of "the professional tax administrators of the Department of Revenue" that the information required about nontaxable sales by Rule 192 and E.T.B. 504.08.192 is necessary to create an "audit trail" to prevent fraudulent tax avoidance. However, the State has offered no evidence, by stipulation or otherwise, to support this contention. Accordingly, we hold and declare that the State may not impose the requirement that the Tribe's non-cigarette retailers keep records of nontaxable transactions.

Finally, we conclude that the Tribe is entitled to a declaratory judgment in conformity with the foregoing declarations in this opinion and to permanent injunctive relief in enforcement thereof.

Neither party shall recover costs or attorney fees in these three-judge District Court proceedings.

We deem it expedient and in conservation of judicial time and effort that the issue of the Tribe's recovery of damages, costs and attorney fees therein, if any, resulting from such Supremacy Clause infringements should be remanded to the single-judge District Court for disposition under further order.

The temporary injunctive relief in favor of the Tribe heretofore issued herein is to remain in force and effect until entry of final judgment herein by this Court.

This decision shall constitute the findings of fact and conclusions of law of this three-judge District Court as provided by Fed. R. Civ. P. 52(a).

Counsel for the Tribe is requested to serve and submit within 30 days from the date hereof a proposed final decla-

ratory judgment and decree of permanent restraint in accordance with the foregoing decision.

DATED this 14th day of February, 1978, in duplicate, one for entry in each of the causes, Nos. 3868 and 3909.

John F. Kilkenny
U. S. Senior Circuit Judge

/s/ WILLIAM G. EAST

William G. East
U. S. Senior District Judge

/s/ HOWARD B. TURRENTINE

Howard B. Turrentine
United States District Judge

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION v. STATE OF WASHINGTON, et al., NOS. 3868 and 3909.

KILKENNY, Concurring and Dissenting:

I commend Judge East on his excellent analysis of the problems before us and only regret that I am unable to concur fully. I dissent only in his conclusions that the tribal cigarette ordinances preempted the field and that the state of Washington had no authority to collect its cigarette tax, and the accompanying sales tax on cigarette sales, even as to non-Indian purchasers.

While Judge East is convinced that the cases of *Fisher v. District Court*, 424 U.S. 382 (1976), and *William v. Lee*, 358 U.S. 217 (1959), are controlling and dispositive of this issue, I am just as convinced that these cases are distinguishable and that *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976), and *Fort Mojave Tribe v. San Bernardino County*, 543 F.2d 1253 (CA9 1976), *cert. denied* 430 U.S. 983 (1977), are controlling and that the cigarette and sales taxes on purchases by non-Indians should be upheld.

Fisher involved a dispute between two Indians on whether the state of Montana or the Indian Tribal Court had exclusive jurisdiction of an adoption proceeding. There, the Court emphasized that the dispute arose on a reservation, entirely among Indians, and went on to say that to allow any court other than an Indian court jurisdiction would cause a corresponding decline ". . . in the authority of the Tribal Court." Here, the issue arises on Indian land, but non-Indians, as well as Indians are involved. The tax here will not be levied against Indians. In *Fisher*, the Court relied heavily on an agreement between the Indian tribe and the United States and the adoption by the tribe of a Constitution and By-Laws pursuant to the Indian Reorganization Act, 48 Stat. 987, a statute specifically intended to encourage Indian tribes to revitalize their self-government. Acting pursuant to this Constitution and By-Laws, the Northern Cheyenne Tribal Council established a Tribal Court and granted it jurisdiction over adoptions "among members of the Northern Cheyenne Tribe." There the

Court held that the state court jurisdiction plainly would interfere with the powers of the self-government conferred upon the Northern Cheyenne Tribe and encouraged by federal legislation. Moreover, it would subject a dispute arising on the reservation among reservation Indians to a forum other than their own. The Court went on to say that no federal statute sanctioned this type of interference with tribal self-government. From there the Court concluded that since the adoption proceeding was appropriately characterized as litigation arising on the Indian reservation, the jurisdiction in the Tribal Court was exclusive. There is no similarity between the facts in *Fisher* and those on the record before us and nothing that is said by the *Fisher* Court is in any way relevant to our record.

In *Williams,* the respondent Lee, a non-Indian, operated a general store on the Navajo Reservation in Arizona under a license required by federal statute. He instituted an action in the superior court of Arizona against Williams, a Navajo Indian and his wife, who lived on the reservation, to collect for goods sold to them on credit. The Arizona trial court granted judgment in favor of Lee. The Arizona Supreme Court affirmed and the Supreme Court accepted *certiorari.* The Supreme Court placed considerable emphasis on Arizona's refusal to accept jurisdiction over Indians pursuant to a congressional enabling act. Obviously, the Court felt that because Arizona had chosen not to accept that responsibility it would be anomalous to allow it to assert jurisdiction over a subject matter on which the Tribal Courts would have full power to act. Here, the state of Washington has completely assumed the congressionally authorized jurisdiction over Indians.

Furthermore, the *Williams* Court, like *Fisher,* based its preemption analysis on the strong federal policy of the Indian Reorganization Act to encourage revitalization of tribal self-government. Since the majority has rejected any claim that the tax is prohibited by the Indian Reorganization Act, its reliance on *Williams* and *Fisher* is further weakened. Additionally, the *Fort Mojave* opinion lends support to the concept that matters of Tribal Court jurisdiction merit special preemption consideration. In distinguishing the *Williams* decision on this jurisdictional rationale, this court wrote:

> "The interference with Indian self-government in the instant case is much less serious. No Indian land is being subjected to direct *state court process.*" *Id.* at 1258. [Emphasis supplied].

Clearly, both *Fisher* and *Williams* go to jurisdictional issues of state v. Indian courts. Here, there is no such dispute. Rather, the only issue here is the validity of the cigarette and sales taxes as applied to non-Indian purchasers. Consequently, *Fisher* and *Williams* cannot be deemed controlling.

It is my considered judgment that *Moe v. Confederated Salish & Kootenai Tribes, supra,* is controlling on our facts. To me, *Moe* settles the question of when and under what circumstances the cigarette tax may be collected on an Indian reservation. *Moe* involved a challenge by the Indian tribe and some of its members to Montana's cigarette sales taxes and personal property taxes on motor vehicles as applied to reservation Indians and also to the state's vendor licensing statute as applied to tribal members who sell cigarettes at smoke shops on the reservation. Relying upon *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164 (1973), and *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), the Supreme Court in *Moe* held that the vendor license fee tax on personal property located within the reservation, as applied to a reservation Indian conducting a cigarette business *for the tribe* on reservation land and the cigarette tax as applied to on-reservation sales by Indians to Indians, would conflict with applicable federal statutes. In so holding, the Supreme Court likened the rights of the tribal members to those of the tribe itself. The Court then went on to hold that the tax immunity for reservation Indians did not constitute invidious racial discrimination against non-Indians contrary to the equal protection clause of the Fifth Amendment. However, the Court limited its decision by requiring the cigarette taxes to be levied on cigarettes sold to non-Indians by on-reservation smoke shops. Moreover, the *Moe* Court held that the Indian proprietor could be obligated to add the tax to the cigarette sales price and thereby aid the state's tax collection and enforcement. In so holding, the Court emphasized the minimal burden in tax collecting, and that in its absence non-Indians purchasing from the tribal seller

would escape payment of a lawful tax. *Moe* rejected the contention that the tax frustrated tribal self-government or conflicted with federal statutes dealing with reservation Indian affairs.

Judge East attempts to distinguish *Moe* from the case before us by arguing that in *Moe* there was no tribal management, financing, or regulation. A careful consideration of the extent of tribal involvement both here and in *Moe* demonstrates the cases' overall similarity. The majority, in my opinion, has extended tribal preemption to unprecedented heights.

The district court opinion in *Moe* fully described the extent of tribal involvement in the regulation of cigarettes.

> "The land is leased from the Tribes upon the Tribal Council's approval of the lessee's plan to erect a smoke shop. The Council controls the purchase of cigarettes for resale by Tribal members and charges an administrative fee in connection therewith." *Confederated Salish & Kootenai Tribes of the Flathead Reservation, Montana v. Moe*, 392 F. Supp. 1297, 1313 (D. Mont. 1975).

This is to be likened to the majority's recitation of the Confederated Tribes' regulations. It quickly becomes apparent that the only meaningful difference between the extent of tribal involvement in the two cases is the Confederated Tribes' decision to levy a tax on cigarettes. The mere imposition of a tribal tax does not rise to the level of a preemption of the taxing field on that article. As this court noted in *Fort Mojave Tribe v. San Bernardino County, supra,*

> "The only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe." *Id.* at 1258.

Of further significance, is the fact that *Moe* speaks of the tribe's rights and involvement rather than voicing similar concerns on behalf of the individual smoke shop dealers. I quote from the opinion:

> "The tribe would carry these cases significantly further than we have done, however, and urges that the state cannot impose its cigarette tax on sales by Indians to non-Indians because '[i]n simple terms, [the Indian retailer] has been taxed, and . . . has suffered a measurable out-of-pocket loss.' But this claim ignores the District Court's finding that 'it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption.'"
>
> * * *
>
> "Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked." 425 U.S. 481-482.

The *Moe* court then says:

> "The *Tribe* asserts that to make the Indian retailer an 'involuntary agent' for collection of taxes owed by non-Indians is a 'gross interference with [its] freedom from state regulation. . . .'" 425 U.S. at 482. [Emphasis supplied].

and then concludes:

> "The State's requirement that the Indian tribal seller collect a tax validly imposed on non-Indians is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concedely [sic] lawful tax . . . . We see nothing in this burden which frustrates tribal self-government. . . ." 425 U.S. at 483.

In my opinion, this language of the *Moe* Court completely answers the majority's view that the imposition of the tax in the instant case frustrates tribal self-government.

Another authority which is closely akin and of controlling importance is *Fort Mojave Tribe v. County of San Bernardino, supra.* There, the county levied a possessory interest tax on non-Indian lessees of land held in trust by the government for the Fort Mojave Indian Tribe. The court determined that the imposition of this type of tax on non-Indian lessees did not violate the Indian Reorganization Act and was not invalid as being an infringement upon

the tribe's right to govern itself. The court also held that the imposition of such a tax by both the Fort Mojave Indian Tribe and the California county on non-Indian lessees of Indian land did not result in improper double taxation. In *Fort Mojave,* the tribe itself imposed a tax on the lease. Here, the tribe itself imposed a tax on the cigarettes. In discussing this "double taxation" issue, the *Fort Mojave* court found no improper double taxation since the taxes were being imposed by two different and distinct taxing authorities and concluded that the uncertain economic burden there imposed on the tribe's ability to levy a tax did not interfere with its right of self-govenment. We note that the *Fort Mojave* court made full use of the Supreme Court decision in *Moe* in arriving at its own conclusion.

Despite what is said by the majority, I find nothing in the record to support Judge East's conclusions that the tribe has preempted, or even attempted to preempt, the entire field of taxation on Indian reservations. Because the state of Washington can lawfully impose its cigarette tax it follows that the state may also collect its authorized sales tax on cigarette purchases by non-Indians. The majority would find such taxes preempted by tribal regulations. I dissent based on my analysis in the foregoing opinion.

I would hold that the state of Washington can validly impose the cigarette and sales tax in question and require the licensed dealers to account for the tax on all sales to non-Indians, keeping an adequate record of such sales. Because the tax, in my opinion, is legal, it follows that some type of a record must be kept.

I purposely have not spoken with regard to the majority's conclusion that the state of Washington may not impose its personal property tax on automobiles owned by Indians living on the reservation. The record before us is totally inadequate and insufficient to consider a tax that falls precisely in between the totally on-reservation activity in *McClanahan* and the totally off-reservation activity in *Mescalero.*

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE,

Plaintiffs,

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer,

Defendants.

No. 3868

DECLARATORY JUDGMENT AND DECREE OF PERMANENT RESTRAINT

Before: KILKENNY, Circuit Judge, EAST and TURRENTINE, District Judges*

Based upon the Decision entered by a majority of this Court on the 22nd day of February, 1978 pursuant to Fed. R. Civ. P. 52(a),

*Originally the statutory three-judge District Court hearing the above was comprised, pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of June 20, 1973, of the Honorable John F. Kilkenny, Senior U. S. Circuit Judge for the Ninth Circuit, William G. East, Senior U. S. District Judge for the District of Oregon, and Charles L. Powell, Senior U. S. District Judge for the Eastern District of Washington. Thereafter pursuant to the designation of Chief Judge Richard H. Chambers for the Ninth Circuit under date of May 10, 1974, the composition of the statutory three-judge District Court herein was redesignated by the designation and appointment of the Honorable Howard B. Turrentine, U. S. District Judge for the Southern District of California, in lieu of the Honorable Charles L. Powell, and the redesignation and appointment of the Honorable John F. Kilkenny and the Honorable William G. East.

IT IS ADJUDGED AND DECLARED as follows:

1. *Cigarette tax*: The imposition of the State of Washington cigarette taxing scheme under R.C.W. 82.24, the administrative regulations promulgated thereunder (particularly WAC 458-20-192 and ETB 504.08.192), and any enforcement thereof by assessment, seizure or otherwise against the plaintiffs Confederated Tribes of the Colville Indian Reservation, Lummi Indian Tribe, and Makah Indian Tribe (Tribes) or their licensed dealers are unlawful in that the cigarette taxing scheme has been preempted by tribal ordinance and constitutes an unreasonable interference with tribal self-government.

2. *Tobacco products tax*: The imposition of the State of Washington tobacco products taxing scheme under R.C.W. 82.26, the administrative regulations promulgated thereunder, if any, and any enforcement thereof against any of the Tribes or their licensed dealers are unlawful in that the legal incidence of the tax falls upon the Tribes or their licensed dealers and results in a direct taxation of Indian income derived from on-reservation activities.

3. *Motor Vehicle, Mobile Homes, Travel Trailers and Campers taxes*: The imposition of the State of Washington motor vehicle excise tax under R.C.W. 82.44 and its mobile homes, travel trailers and campers excise tax under R.C.W. 82.50,[1] the administrative regulations promulgated thereunder and any enforcement thereof against any of the Tribes or their reservation resident members regarding motor vehicles, mobile homes, travel trailers and campers, used exclusively or in part on their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

4. *Sales/use tax*: The imposition of the State of Washington sales/use tax under R.C.W. 82.08 and 82.12,[2] the

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1. The validity of the State of Washington sales/use tax under R.C.W. 82.08 and 82.12 as applied to motor vehicles, travel trailers and campers owned by any of the Tribes or their reservation resident members and used exclusively or in part on their reservations is not adjudicated herein because the Tribes did not raise it as an issue for decision in the pretrial order.

2. The sales/use tax issue was properly raised in the pretrial order in this context.

administrative regulations promulgated thereunder and any enforcement thereof against any of the Tribes or their reservation resident members regarding mobile homes delivered to them and located inside the exterior boundaries of their reservations are unlawful as an infringement of their rights secured under federal statutes and treaties.

5. *Record Keeping*: The imposition of a requirement under R.C.W. 82.24.090, 82.26.060, WAC 458-20-192 and ETB 504.08.192, that the Tribes or their licensed dealers keep records of transactions declared (in one and two above) or conceded to be nontaxable is unlawful as an infringement of their rights secured under federal statutes and treaties.

6. *State of Washington Indian Jurisdiction*: The State of Washington's exercise of civil and criminal jurisdiction under R.C.W. 37.12, the regulations promulgated thereunder, and enforcement thereof against the Lummi Indian Tribe or the Makah Indian Tribe or any of their reservation resident members are unlawful as a denial of Equal Protection under the United States Constitution. However, exercise of similar jurisdiction over the Colville Confederated Tribes or any of their reservation resident members does not constitute a violation of the Equal Protection Clause.

7. *Damages*: No party shall recover costs or attorney fees in this three-judge proceeding. In the interest of judicial economy, the issue of the Tribes' recovery of damages, if any, together with costs and attorney fees therein, is remanded to a single judge District Court for disposition under further hearing and order.

IT IS FURTHER ORDERED AND DECREED that the defendant State of Washington, its officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them are hereby permanently enjoined from:

1. Imposing the State of Washington cigarette tax upon non-Indians purchasing cigarettes from any of the Tribes or their licensed dealers on their reservations;

2. Imposing the State of Washington tobacco products

tax upon any of the Tribes or their licensed dealers on their reservations;

3. Requiring that such sales and sales to Indians be reported to the State of Washington;

4. From engaging in any action or acting in any manner to assess such taxes upon any of the Tribes or their licensed dealers or to seize cigarettes, tobacco products or their containers, or to confiscate such cigarettes, tobacco products or their containers, owned, possessed or sold by the Tribes or their licensed dealers;

5. Imposing the State of Washington motor vehicle excise tax and its mobile homes, travel trailers and campers excise tax upon any of the Tribes or their resevation resident members regarding motor vehicles, mobile homes, travel trailers and campers used exclusively or in part on the reservation;

6. Imposing the State of Washington sales/use tax upon any of the Tribes or their reservation resident members regarding mobile homes delivered to them and located inside the exterior boundaries of their reservations.

DATED this 1st day of May, 1978.

WILLIAM G. EAST
U.S. SENIOR DISTRICT JUDGE

HOWARD B. TURRENTINE
UNITED STATES DISTRICT JUDGE

The Honorable John F. Kilkenny joins in the foregoing Declaratory Judgment only to the extent of his concurring opinion. Otherwise, I dissent.

DATED this 8th day of May, 1978.

JOHN F. KILKENNY
U.S. SENIOR CIRCUIT JUDGE

APPENDIX C

United States Constitutional Provisions:

United States Constitution, Art. I §8, cl. 2

> "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Constitution, Fourteenth Amendment:

Section 1.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX D

Washington Enabling Act:

25 Stat. 676

§4

. . . And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

. . . .

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States:

APPENDIX E

Washington Constitutional Provisions:
Washington Constitution, Art. 26, § Second:

COMPACT WITH THE UNITED STATES

The following ordinance shall be irrevocable without the consent of the United States and the people of this state:—

. . . .

Second. That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof; and that no taxes shall be imposed by the state on lands or property therein, belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, That nothing in this ordinance shall preclude the state from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long and to such an extent as such act of congress may prescribe.

APPENDIX F

Civil Rights Act of 1968:

25 U.S.C. §§1321-1326:

§1321

(a) The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Pub. L. 90-284, Title IV, §401, Apr. 11, 1968, 82 Stat. 78.

§1322

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub. L. 90-284, Title IV, §402, Apr. 11, 1968, 82 Stat. 79.

§1323

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

Pub. L. 90-284, Title IV, §403, Apr. 11, 1968, 82 Stat. 79.

§1324

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be. Pub. L. 90-284, Title IV, §404, Apr. 11, 1968, 82 Stat. 79.

§1325

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purpose of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

Pub. L. 90-284, Title IV; §405, Apr. 11, 1968, 82 Stat. 80.

§1326

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

Pub. L. 90-284, Title IV, §406, Apr. 11, 1968, 82 Stat. 80.

APPENDIX G

United States Statutes:

Public Law 83-280, 67 Stat. 588 (1953).

To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

> "1162. State jurisdiction over offenses committed by or against Indians in the Indian country."

Sec. 2, Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows:

> "§1162. State jurisdiction over offenses committed by or against Indians in the Indian country.
>
> "(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State, shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State

Oregon.....All Indian country within the State, except the Warm Springs Reservation

Wisconsin.....All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section."

Sec. 3 Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1331 of such title the following new item:

"1360. State civil jurisdiction in actions to which Indians are parties."

Sec. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

"§1360. State civil jurisdiction in action to which Indians are parties.

"(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the

name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

"State of	Indian Country Affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section."

Sec. 5. Section 1 of the Act of October 5, 1949 (63 Stat. 705, ch. 604), is hereby repealed, but such repeal

shall not affect any proceedings heretofore instituted under that section.

Sec. 6. Nothwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their state constitution or statutes as the case may be.

Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Approved August 15, 1953.

APPENDIX H

Executive Order:

Executive Order Dated July 2, 1872, 1 Kappler 916.

EXECUTIVE MANSION
Washington, July 2, 1872

It is hereby ordered that the tract of country referred to in the within letter of the Commissioner of Indian Affairs as having been set apart for the Indians therein named by Executive order of April 9, 1872, be restored to the public domain, and that in lieu thereof the country bounded on the east and south by the Columbia River on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.

U. S. GRANT

APPENDIX I

Washington State Statutes

Indians and Indian Lands 37.12.010

37.12.010 Assumption of criminal and civil jurisdiction by state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;

(2) Public assistance;

(3) Domestic relations;

(4) Mental illness;

(5) Juvenile delinquency;

(6) Adoption proceedings;

(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further,* That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

37.12.021 ——Resolution of request—Proclamation by governor, 1963 act. Whenever the governor of this state shall receive from the majority of any tribe or the tribal council or other governing body, duly recognized by the Bureau of Indian Affairs, of any Indian tribe,

community, band or group in this state a resolution expressing its desire that its people and lands be subject to the criminal or civil jurisdiction of the state of Washington to the full extent authorized by federal law, he shall issue within sixty days a proclamation to the effect that such jurisdiction shall apply to all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the state: *Provided,* That jurisdiction assumed pursuant to this section shall nevertheless be subject to the limitations set forth in RCW 37.12.060.

Supreme Court, U. S.
FILED
AUG 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1978

No. 78-60

CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION; LUMMI INDIAN TRIBE; and MAKAH INDIAN TRIBE, *Appellants*,

v.

STATE OF WASHINGTON; CHARLES HODDE, Individually and as Director of the State of Washington Department of Revenue; JACK G. NELSON, Individually and as Director of the State of Washington Department of Motor Vehicles; and ROBERT S. O'BRIEN, Individually and as Washington State Treasurer, *Appellees*.

ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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ON APPEAL FROM THE DISTRICT COURT OF THE EASTERN DISTRICT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States the appellees move the Court to dismiss the appeal herein for lack of a substantial federal question or, in the alternative, to affirm the judgment of the District Court of the Eastern District of Washington on the ground that it is manifest that the questions on which the de-

cision of the cause depends are so unsubstantial as to not need further argument.

QUESTIONS PRESENTED

1. *The Disclaimer Issue*: Does Public Law 83-280 (67 Stat. 588) require the State of Washington to repeal expressly the "disclaimer" clause contained in Article XXVI of its constitution as a condition for a valid assumption of any jurisdiction, total or partial, over an Indian reservation?

2. *The Equal Protection Issue*: Does chapter 37.12 RCW, as applied to members of the Colville Tribe situated on the Colville Reservation, violate the constitutional rights of those tribal members arising under the Equal Protection Clause of the Fourteenth Amendment in the following circumstances:

(a) Pursuant to the terms of chapter 37.12 RCW, the Colville Tribe has exercised its option to have total state jurisdiction apply to its reservation;

(b) Other tribes in Washington (such as the Lummis and Makahs) have not so exercised this option for their own reservations; and

(c) As a result, certain state laws are applicable to members of the Colville Tribe on the Colville Reservation, while those same laws are not similarly applicable to other Indians on other reservations?

STATEMENT OF THE CASE

A. Washington's Response to Public Law 280.

Public Law 280 (67 Stat. 588), enacted by Con-

gress in 1953, provided for the immediate transfer of jurisdiction over most, though not all, Indian reservations in California, Minnesota, Nebraska, Oregon and Wisconsin from the United States to those respective states. That same act, in §§ 6 and 7, allowed other states to assume such jurisdiction, provided certain conditions were first met.

Responding to that act the State of Washington in 1957 obligated and bound itself to assume civil and criminal jurisdiction over all Indians and Indian reservations located within its borders, but only when a tribe or its governing body adopted a resolution petitioning the State to assume such jurisdiction. (Chapter 240, Laws of 1957).

In 1963 the state legislature amended that act by enacting chapter 36, Laws of 1963, now codified as chapter 37.12 RCW. By this amendment it retained the principle of tribal option, but placed limits upon it.

That amendment provided for the assumption of jurisdiction, civil and criminal, over all "Indians and Indian territory, reservations, country, and lands * * * *" (RCW 37.12.010). However, this broad assumption of jurisdiction was subject to an important exception.

It would not apply to Indians "when on their tribal or allotted lands within an established Indian reservation * * *" if (1) those lands were held in a trust or otherwise restricted status ("trust lands") *and* if (2) the tribe had not petitioned for a

complete assumption of jurisdiction by the state. Thus, the tribal option was limited to determining whether state jurisdiction would be exercised over Indians on trust lands. Jurisdiction over non-Indians, wherever located, and over Indians on non-trust lands was no longer subject to the tribal option.

Two additional features of this option should be noted. First, it was not a complete one, even as to Indians on trust lands. In certain specific subject matters, the state assumed jurisdiction over Indians on these lands even if the tribe did not so request. Those subject matters are compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children and the operation of motor vehicles upon public streets, alleys, roads and highways. (RCW 37.12.010.)

Second, if the tribe exercised its option for complete state jurisdiction, the assumption of that jurisdiction was automatic. The only act left to be taken by any state official was purely ministerial, i.e., issuance of a proclamation by the governor. RCW 37.12-.021. Upon issuance of that proclamation, the jurisdiction was in effect.

The 1957 Act and the 1963 amendment constitute the only action taken by the Washington State Legislature in response to Public Law 280. It has not initiated procedures for repealing the "disclaimer" clause in Article XXVI of the State Constitution.

B. The Appellant Tribes' Varying Responses to Chapter 37.12 RCW.

On January 14, 1965, the Colville Business Council enacted a resolution requesting state assumption of total jurisdiction over the Colville Reservation. The governor issued the proclamation as required by RCW 37.12.021. And on the date of that proclamation, January 29, 1965, total state jurisdiction was in force on the Colville Reservation.

The Lummi and Makah Tribes, however, have never made any such request, under either the original 1957 act or the 1963 amendment.

C. Population Patterns on the Reservations Involved.

On the Colville Reservation, the total population is 7,027, of whom approximately 3,200 are tribal members. (Pre-Trial Order, p. 14). On the Makah Reservation, the total population is 1,435, of whom approximately 900 are tribal members. (Id. at p. 15). On the Lummi Reservation, the total population is approximately 2,150, of whom approximately 1,250 are tribal members. (Id. at p. 14 and The Legal Relationship Between Washington State and its Reservation-based Indian Tribes, Office of Program Research, House of Representatives, Olympia, Washington, December, 1977, p. 29.[1])

[1]The figure of 900 non-Indian residents used in computing the total population on the Lummi Reservation is based upon 1970 census data. (The Legal Relationship Between Washington State and its Reservation-based Indian Tribes, p. 29.)

THIS APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

A. The Disclaimer Issue Has Already Been Resolved By This Court.

In at least eight previous reported cases, including three in which their claims were rejected by this Court, various Indian tribes or individual Indians have attempted to persuade some court that the State of Washington could not validly assume any jurisdiction over Indians or Indian reservations without first amending Article XXVI of its constitution.

This case is the ninth.

In each case in which this question has been presented to either the Supreme Court of the State of Washington, or to a federal district or appellate court, those courts have squarely held that such an amendment was not required by Congress. *State v. Paul*, 53 Wn.2d 789, 337 P.2d 33 (1959); *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, cert. den. 387 U.S. 907 (9th Cir., 1966); *Dixon v. Rhay*, 396 F.2d 760 (9th Cir., 1968); *Makah Indian Tribe v. State*, 76 Wn.2d 485, 457 P.2d 590, app. dism'd 397 U.S. 316 (1969); *Tonasket v. State*, 84 Wn.2d 164, 525 P.2d 744, app. dism'd 420 U.S. 915 (1974); *Comenout v. Burdman*, 84 Wn.2d 192, 525 P.2d 217, app. dism'd 420 U.S. 915 (1974). Both the district court and the court of appeals adhered to that view in *Confederated Bands and Tribes of the Yakima Indian Nation v. State of Washington, et al.*, 550 F.2d 443, 444 (9th Cir., 1977), probable jurisdiction

noted February 27, 1978, No. 77-388. In three of those cases that question was squarely presented to this Court on appeal, and in each case the appeal was dismissed for want of a substantial federal question. *Makah Indian Tribe v. Washington*, 397 U.S. 316 (1970); *Tonasket v. Washington*, 420 U.S. 915 (1975); *Comenout v. Burdman*, 420 U.S. 915 (1975).

The disposition of the question should be the same in this case. Appellant tribes provide no reason for it being different.[2]

Further, the fact that these dismissals constitute direct adjudications on the merits provides all the more reason for the disposition of this question being the same.

> "As Mr. Justice Brennan once observed, '[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. * * *' Ohio ex rel. Eaton v. Price, 360 US 246, 247; * * *" *Hicks v. Miranda* 422 U.S. 332 at 343 and 344.

The pendency of *State of Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, No. 77-388, should, of course, be taken into consideration in determining the disposition of the disclaimer question in this case. For that question *may* be involved in *Yakima* as well.

In *Yakima*, as here, we submit that the question

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[2]The persistence of the Tribes in litigating this question is strikingly illustrated by the fact that the Appellant in the first of these three cases, the Makah Tribe, is also an appellant here. Not only is the principle of *stare decisis* apparently to be jettisoned, but the principle of *res judicata* as well.

is settled, and is not properly before this Court for plenary consideration. The Yakima Tribe and the United States contend that the question has not been settled; they further contend that even if it has been settled, it has been settled incorrectly, and that the supposed error should be corrected after plenary consideration.

We prefer to address these contentions in *Yakima*, not here. In our reply brief, which will be filed shortly, we shall show that the contentions of the United States and the Tribe are without merit; the question has not only been settled, but settled correctly.

The Court, accordingly, may wish to postpone a decision on the disposition of the disclaimer question in this case until the briefing in *Yakima* is complete. It may even wish to wait until after oral argument in *Yakima*.

However, a disposition of the disclaimer question in this case should not delay oral argument in *Yakima*. Yet that would be the inevitable result, we believe, if the Court were to accept the Appellant's suggestion that this case should be consolidated with *Yakima* for oral argument. (Juris. St. at p.2).[3] *Yakima* will be ready for oral argument very shortly; this case will not.

Further, this case involves other issues on which the District Court ruled against the State, and which

[3]Appellants can just as easily present their arguments by filing an amicus curiae brief in *Yakima*. The State has no objection to such participation—and would welcome oral argument by the Colville Tribe as amicus in support of the Yakima Tribe's position.

will be the subject of the State's appeal in this same litigation.[4]

In summary we submit that the disclaimer question as presented in this case should be disposed of by dismissing the appeal or summarily affirming the judgment. The Court may wish to wait before taking that step, until completion of briefing and perhaps even oral argument in *Yakima*. But this case, the main body of which is not yet even before this Court, should not be allowed to delay oral argument and a final decision in *Yakima*.

B. The Equal Protection Issue is Frivolous.

The essence of the argument of the Colville Tribe on this issue is simply stated: No rational basis exists for subjecting members of the Colville Tribe on the Colville Reservation to the full scope of state jurisdiction, while the members of the Lummi and Makah Tribes on their respective reservations are not so subject.

The difficulty with this argument is that, if valid, it proves too much. For example, under § 2 of Public Law 280, as originally enacted, various reservations were specifically excluded from the scope of the jurisdiction conferred upon three of the five "mandatory" statutes. The Red Lake Reservation was excluded from the jurisdiction conferred upon

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[4]Those issues are essentialy three: The right of the State to require Indian vendors to collect state cigarette and retail sales taxes imposed on these vendors' non-Indian customers; the right of the State to impose its motor vehicle excise tax on Indian-owned vehicles used off the reservation; and for the Lummis and Makahs, though not the Colvilles, the same equal protection issue as involved in *Yakima*.

Minnesota, the Warm Springs Reservation from the jurisdiction conferred upon Oregon, and the Menominee Reservation from the jurisdiction conferred upon Wisconsin.

Under the Colville Tribe's argument, Congress thereby violated the Equal Protection Clause.

And apparently Congress violated it again (or at least encouraged its violation by states and tribes) when it unmistakably authorized the "option" states to make further assumption of jurisdiction on a reservation by reservation basis.[5]

The Colville Tribe would be correct, of course, in suggesting that the reason the three named reservations were excluded in § 2 of Public Law 280 is that this result reflected the wishes of the three tribes involved. And the Tribe would also be correct in suggesting that further assumptions of jurisdiction under the 1968 amendments to Public Law 280 on a reservation by reservation basis would likewise reflect the wishes of the tribes involved. For tribal consent, through a tribal referendum, is a necessary condition for any such assumption.

But so too here, the reason the State has assumed total jurisdiction over the Colville Reservation is that *this is what the Tribe wanted.* The Tribe petitioned for total jurisdiction in 1965. Likewise, the

[5]See §§ 401 and 402 of the Civil Rights Act of 1968, P.L. 90-284, 82 Stat. 78. These 1968 amendments to Public Law 280 allow not only selectivity *between* reservations, but selectivity *within* a single reservation, both by subject matter and geographical area. Whether similar selectivity is permissible under Public Law 280 as originally enacted is, of course, a principal issue in *Yakima;* it is not an issue here.

reason the State has not assumed total jurisdiction over the Lummi and Makah Reservations is that this is what those two tribes wanted. They did not petition for total jurisdiction at any time.

We find it difficult to believe that the differing wishes of different tribes do not provide a rational basis for differing jurisdictional results. To put the matter as pointedly as possible: The members of the Colville Tribe are subject to laws different from those governing the Lummis and Makahs for one simple reason. That is the choice the Colville Tribe made for its members.

The Tribe's claim that this results in their members being deprived of their constitutional rights is frivolous.

CONCLUSION

For the reasons given above, the appeal should be dismissed or, alternatively, the judgment appealed from should be summarily affirmed.

Respectfully submitted,

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